longer-lasting barbiturate, is used for animal euthanasia. The AVMA states that when potassium chloride is used for euthanasia, it is extremely important for the personnel who perform euthanasia to be trained and knowledgeable in anesthetic techniques and competent in assessing the anesthetic depth appropriate for potassium chloride administration, a depth at which animals are in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli. California law requires non-veterinary personnel who perform animal euthanasia to undergo strict training by a veterinarian and/or a registered veterinary technician who specializes in anesthesia. The Department of Correction's lethal injection protocol under Procedure No. 770 includes no comparable requirement; in fact, it does not require any training of the personnel who use the same drug in executing prisoners.

26. The Department of Correction's lethal injection procedure fails to address the individual prisoner's medical condition and history. Several regularly prescribed drugs at San Quentin interfere with the ability of sodium pentothal to act properly as an anesthetic. Moreover, the lethal injection protocol allows for prisoners to take Valium shortly before the execution, a drug which can also interfere with the sodium pentothal's effectiveness.

27. Procedure No. 770 contains no description of the training, credentials, certifications, experience, or proficiency required of any personnel involved in the administration of the lethal injection procedure, notwithstanding the fact that it is a complex medical procedure requiring a great deal of expertise in order to be performed correctly. For example, Procedure No. 770 does not require at the execution the presence of any personnel who possess sufficient expertise to insert an intravenous line properly, determine if there is a blockage in the intravenous line, or evaluate whether a prisoner is properly sedated before proceeding with the painful parts of the execution process.

28. The absence of such trained personnel greatly increases the risk that a prisoner would not receive the necessary amount of anesthetic prior to being paralyzed by the pancuronium bromide and then experience the painful internal burn of the potassium chloride. Toxicology reports from prisoners executed by other states suggest that some prisoners likely remained conscious during the

administration of lethal drugs, which could have occurred because of improper insertion of the intravenous line, an unrecognized blockage in the line, or various other reasons.

29. Inducing unconsciousness by correctly administering sodium thiopental is indispensable to preventing the wanton infliction of pain when the potassium chloride overdose is administered. Procedure No. 770, however, does not require the preparation of backup syringes of sodium thiopental.

30. The Department of Correction's lethal injection protocol fails to address any reasonably foreseeable complications with any appropriate medical response. Moreover, the protocol includes no safeguards that would protect the prisoner in the event a stay of execution is entered after the lethal injection process has begun. Thus, the protocol fails to provide any protections to prevent a prisoner from being wrongly executed should a reprieve be granted after the process has begun but before death has occurred.

31. At any time before the potassium chloride is administered, the prisoner could be readily resuscitated if trained personnel and routine resuscitation medication and equipment were present at the execution site. Even after the potassium chloride is administered, resuscitation would still be possible, although admittedly it would be more challenging. Any resuscitation, however, would require the close proximity of the necessary equipment, medication, and properly trained personnel. The omission of such personnel and equipment under the protocol set forth in Procedure No. 770 further undermines the constitutionality of the procedure.

32. Although it is possible to conduct executions in a constitutionally compliant manner, the Department of Corrections has chosen not to do so. The Department of Corrections could choose to use different chemicals that pose a low risk of administration error yet do not cause extraordinarily grave consequences to a condemned inmate if not properly administered; instead, it has knowingly or recklessly chosen to use chemicals that pose a high risk of administration error. Moreover, it has not taken precautions to ensure that the personnel who administer the lethal injection chemicals possess the training, experience, and expertise needed to administer those chemicals properly. Thus, while it is possible for the Department of Corrections to choose different lethal injection chemicals and/or

retain qualified personnel to administer its chosen chemicals in order to ensure the constitutionality of its lethal injection procedure, the Department of Corrections has not done so.

COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF

33. The use of pancuronium bromide under the protocol established in Procedure No. 770 to paralyze plaintiff greatly increases the risk that a conscious prisoner will be subjected to a painful and protracted death. Moreover, it serves no legitimate penological purpose.

34. Pancuronium bromide does not play a legitimate role in killing the condemned person. The execution protocol provides that potassium chloride kills the condemned. The administration of pancuronium bromide cannot be justified on the grounds that the drug paralyzes the breathing muscles because death by asphyxiation is itself a form of cruel and unusual punishment under the Eighth Amendment.

35. If pancuronium bromide is administered, paralyzing plaintiff during the execution procedure, he will have no alternative "reasonable and effective means of communication" to communicate that he was not properly anaesthetized because he will be dead at the conclusion of the procedure.

36. Enjoining the administration of pancuronium bromide will have no appreciable impact on California correctional institution procedures. If anything, it will simplify the execution process by eliminating one step in the process.

37. The question of whether there exist readily available alternatives to pancuronium bromide is not an issue in this case because paralyzing a condemned inmate in the execution process is not a legitimate penological goal.

38. The Ninth Circuit and this Court have previously held that Defendants and their predecessors, in order to forestall discussion and criticism of California's lethal injection procedure, have implemented restrictions on the execution process in order to prevent witnesses from being aware of complications experienced during the procedure.

39. The Department of Correction's failure to require sufficient training, credentials, certification, experience, or proficiency of the personnel involved in the administration of the lethal injection procedure greatly increases the risk that a conscious prisoner will experience excruciating pain as a

result of the conscious suffocation caused by the pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose. Moreover, it serves no legitimate penological purpose.

40. Allowing personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure does not play a legitimate role in killing the condemned person. Conscious suffocation, as caused by the administration of pancuronium bromide, violates the Eighth Amendment because death by asphyxiation is itself a form of cruel and unusual punishment. Similarly, conscious internal burning and cardiac arrest, as caused by a potassium chloride overdose, constitute unnecessary physical and psychological pain in violation of the Eighth Amendment.

41. If plaintiff remains conscious during the administration of the pancuronium bromide and potassium chloride, he will have no alternative "reasonable and effective means of communication" to communicate the fact that he was not properly anaesthetized because the pancuronium bromide will paralyze him and he will be dead at the conclusion of the procedure.

42. Enjoining the administration of the lethal injection procedure by personnel who lack sufficient training, credentials, certification, experience, or proficiency will have no appreciable impact on the correctional institution.

43. The question of whether there exist readily available alternatives to requiring personnel who possess sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure is not an issue in this case because causing a prisoner who has not been properly anaesthetized as a result of administration error to experience excruciating pain from the conscious suffocation caused by pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose is not a legitimate penological goal.

EXHAUSTION ALLEGATIONS

44. On January 9, 2006, plaintiff filed an inmate appeal on CDC Form 602 alleging that his execution under the lethal injection protocol of the California Department of Corrections would constitute cruel and unusual punishment. A copy of the Form 602 is attached hereto as Exhibit A.

Plaintiff asked that his appeal be processed as an emergency appeal pursuant to 15 Cal. Code Regs. § 3084.7 on the ground that the State of California shortly intended to seek his execution date. On or about January 27, 2006, the Director's Level Appeal Decision was issued, which stated that "no further relief shall be afforded the appellant at the Director's Level of Review." The decision stated that "This decision exhausts the administrative remedy available to the appellant within CDCR." A copy of the Director's Level Appeal Decision is attached hereto as Exhibit B.

45. Notwithstanding his filing of an appeal on CDC Form 602 and the resolution pursuant to the Director's Level Appeal Decision, Plaintiff was not required to exhaust administrative remedies before bringing this claim because resolution of the grievance seeking modification of Procedure No. 770 is not possible through the appeal process and exhaustion is futile.

46. On November 24, 2004, Donald J. Beardslee, San Quentin Inmate No. C-82702, raised a challenge similar to plaintiff's claim here when he filed two inmate appeals on CDC Form 602 alleging that the Department of Correction's lethal injection procedure violated his rights under the First and Eighth Amendments to the United States Constitution. After being considered on an emergency basis, the appeals were first denied by the Warden and then denied by the Director of the Department of Corrections on Third Level Review. In denying Beardslee's appeal, the Director's Level Appeal Decision stated that Beardslee's "sentence and penalty were established by court in California; therefore relief at the Director's Level of Review cannot be afforded the appellant." Administrative review therefore cannot resolve any of the issues raised in plaintiff's appeal.

47. Moreover, pursuit of administrative review is futile for additional reasons. In subsequent proceedings in Beardslee's case, the Court of Appeals for the Ninth Circuit observed that "by regulation the California Department of Corrections does not permit challenges to anticipated action[s]. 15 Cal. Code Regs. § 3084.3(c)(3)." *Beardslee v. Woodford*, 395 F.3d 1064, 1069 (9th Cir. 2005). Thus, no administrative challenge to the lethal injection protocol is possible here.

48. Plaintiff's challenge to the lethal injection protocol that the Department of Corrections intends to use to execute him is ripe for adjudication now.

PRAYER FOR RELIEF

WHEREFORE, Michael Angelo Morales prays for:

1. Temporary, preliminary, and permanent injunctive relief to enjoin the defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing plaintiff by lethal injection using Procedure No. 770;

2. In the event that Procedure No. 770 is not enjoined in its entirety as violating the Eighth and Fourteenth Amendments, temporary, preliminary, and permanent injunctive relief to enjoin defendants, their officers, agents, servants, employees, and all persons acting in concert with them from administering pancuronium bromide during the execution process;

3. In the event that Procedure No. 770 is not enjoined in its entirety as violating the Eighth and Fourteenth Amendments, temporary, preliminary, and permanent injunctive relief to enjoin defendants, their officers, agents, servants, employees, and all persons acting in concert with them from allowing personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure;

4. Reasonable attorneys' fees pursuant to 42 U.S.C. § 1983 and the laws of the United States;

5. Costs of suit; and

6. Any such other relief as the Court deems just and proper.

MICHAEL ANGELO MORALES

By: /s/
John R Grele

Dated: February 10, 2006

David A. Senior (# 108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R. Grele (# 167080)
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken
Benjamin J. Bradford
Janice H. Lam
Stephanie L. Reinhart
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Ginger D. Anders
Jenner & Block LLP
601 Thirteenth Street, NW
Suite 1200 South
Washington DC 20005-3823
Phone: (202) 639-6000
Fax: (202) 639-6066
ganders@jenner.com

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES, Plaintiff, v. Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoksi, Acting Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 06 219 JF Case Number C 06 926 JF RS DEATH-PENALTY CASE ORDER REQUESTING SUPPLEMENTAL BRIEFING [Docket No. 12]

In connection with its pending determination as to whether it should grant relief to Plaintiff, the Court is interested in Defendants' view as to whether either of the following would be feasible:

(1) Proceeding with the execution using only sodium thiopental; or

(2) Utilizing an independent means—including but not limited to a medical device or the presence of a qualified individual approved by the Court—to insure that Plaintiff in fact is unconscious before pancuronium bromide and potassium chloride are injected.

Defendants shall respond to this inquiry in writing by 5:00 p.m. today; such response shall not be deemed a waiver of Defendants' position that Plaintiff is not entitled to injunctive relief. Plaintiff may respond to Defendants' submission not later than 12:00 noon tomorrow.

The Court still intends to rule on Plaintiff's motion for a preliminary injunction by the close of business tomorrow.

IT IS SO ORDERED.

DATED: February 13, 2006

JEREMY FOGEL
United States District Judge

E-filed 2/13/06

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES, Plaintiff, v. RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Defendants.	Case No. C 06 0219 ~~[PROPOSED]~~ ORDER GRANTING CONSOLIDATION

This Court, having heard the application of Plaintiff for consolidation, and for good cause shown, hereby GRANTS the application. This action is hereby consolidated with case no. C 06- 0926 (JF).

IT IS SO ORDERED.

Dated: 2/13/06

Jeremy Fogel
United States District Court Judge

Submitted by:

David A. Senior (#108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067

John R Grele (#167080)
Law Offices of John R Grele
703 Market Street, Suite 550
San Francisco, CA 94103

Richard P. Steinken
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603

Attorneys For Plaintiff MICHAEL ANGELO MORALES

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: gillette.dane@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, v. **RODERICK Q. HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants.	**CAPITAL CASE** C 06-219 JF **DEFENDANTS' RESPONSE TO COURT INQUIRY**

In an order filed February 13, 2006, the Court requested the defendants' views on two questions. Defendants respond as follows.

1. Would it be feasible to proceed with plaintiff's execution using only sodium thiopental.

The five gram dose of thiopental will quickly render plaintiff unconscious and will ultimately result in his death; proceeding in that manner is therefore "feasible." However, it could take as long as 30 to 45 minutes for the thiopental to result in a flat line on the EKG monitor, which is the basis upon which death is pronounced. By contrast, in ten lethal injection executions the average time from first injection of thiopental to death is 11.3 minutes. Proceeding with only the thiopental would unnecessarily delay completion of the execution and would be unfair to the

witnesses and execution team. Accordingly, defendants decline to modify I.P. 770 in order to conduct plaintiff's execution using only sodium thiopental.

2. Would it be feasible to proceed with plaintiff's execution using independent means to insure that plaintiff is in fact unconscious before pancuronium bromide and potassium chloride are injected.

In raising this question the Court suggested as possible procedures the use of a medical device or the presence of a qualified individual approved by the Court. The first of these approaches is not feasible because defendants are not aware of any easily obtainable medical equipment that could be effectively used by the prison execution team to monitor consciousness. The second approach may be feasible. Because defendants will not approve the presence of non-departmental employees in the chamber area during the execution, they propose the following.

Defendants are advised that having someone next to the inmate who could touch him to assess response to stimuli is a means of determining consciousness. That person would have to remain in the chamber after the inmate has been strapped to the gurney, the IV's established, and the door is closed, in full view of all witnesses to the execution. For purposes of plaintiff's execution only, Warden Ornoski will undertake that task.

Dated: February 13, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Defendants

David A. Senior (# 108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R. Grele (# 167080)
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Attorneys For Plaintiff MICHAEL ANGELO MORALES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES, Plaintiff, v. RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Defendants.	Case No. C 06 0219 (JF) C 06 926 (JF) **RESPONSE TO DEFENDANT'S POSITION RE COURT'S INQUIRY** **DEATH PENALTY CASE**

The Court has made three inquiries:

(1) The viability of using solely sodium thiopental in the execution of Mr. Morales;

(2) The viability of using monitoring devices to determine unconsciousness;

(3) The viability of having an individual present to monitor unconsciousness.

Defendants have responded that (1) while using solely sodium thiopental might be viable medically, they decline to modify the protocol; (2) while there are monitoring devices, they decline to use them because they are not "easily" obtainable and cannot be used "effectively" by the personnel currently assigned; and, (3) they can allow Warden Oronski to be in the chamber to monitor unconsciousness by touching Mr. Morales and seeing if there is a reaction. Mr. Morales offers this response.

1. The Use of Sodium Thiopental to Accomplish the Execution

Because defendants have declined to exercise this option, plaintiff's position is moot. However, plaintiff notes that an execution by means of sodium thiopental is medically possible, *assuming proper administration* with properly trained personnel and a procedure that does not contain the high degree of risk that is present under Procedure 770. *See* Fourth Declaration of Mark Heath. M.D. pars.2-6. Plaintiffs are informed that such a process would take some time, although how much is uncertain. *Id.*, at par. 14.

Removal of the remaining two chemicals will greatly reduce the risk of error that has been identified in previous submissions. There is one difficulty, and that is that thiopental is relative less stable than other, available sedatives like phenobarbital. *See* Fourth Declaration of Mark Heath. M.D. par.3.

The absence of the pancuronium would also serve to allow the witnesses to

exercise their proper role of informing the public about their observations regarding any apparent cruelty or the humanity of the procedure, something they are now prevented from doing. It will also allow the execution team to be assured they are acting appropriately in the event of difficulties – a second dose of thiopental can easily be administered without having to guess at whether or not it is necessary. And, it is entirely consistent with the Ethical Guidelines for Critical Care issued for end of life procedures. *See* Exhibit 2 to Second Declaration of Mark Heath (submitted with plaintiff's Reply).

Finally, the absence of potassium chloride will allow for an execution team that does not have to struggle with determining anesthetic depth.

2. Monitoring Devices

Again, because defendants have declined to employ monitoring devices, plaintiff's position is somewhat academic. Plaintiff is informed that there are devices that can be used to monitor certain events that indicate consciousness. Those devices require properly trained and experienced medical personnel.

As Dr. Heath has offered, the use of a brain monitoring device could provide an indication of unconsciousness. However, operation of the device does require a sufficient level of expertise, and also requires a properly trained and experienced monitor using that device, as well as incorporating other observations, in determining unconsciousness. *See* Fourth Declaration of Mark Heath. M.D. pars. 7-9, 16.

3. The Warden's "Touching" Method of Determining Consciousness

Defendants have offered to have the Warden present within reach of Mr. Morales so that he can employ "a means" of determining if Mr. Morales is conscious. This "means" is really a poke at an undefined time in an undefined location. There are several problems with this.

The first difficulty is that defendants offer no medical training or expertise by the Warden, so it must be assumed he has none. The Warden's comments after the Allen execution that it required two doses of potassium chloride because Mr. Allen's heart had beaten for 76 years is not an opinion that inspires confidence in the Warden's medical knowledge or ability. *See* Exhibit A. The Warden is, obviously, not the individual one would hope is determining anesthetic depth in medical procedures at San Quentin. *See* Fourth Declaration of Mark Heath. M.D. par. 17.

Some degree of medical training in determining an appropriate level of consciousness is required. *See* Fourth Declaration of Mark Heath. M.D. pars. 10-13, 17-18. This can be seen from Dr. Dershwitz's most recent declaration wherein he posits that even medical doctors are not able to discern breathing correctly. Unconsciousness cannot be determined by an untrained person. In fact, plaintiff is informed that it can be difficult, even for someone with a medical degree. *See* Fourth Declaration of Mark Heath. M.D. par. 17. There are trained personnel available to accomplish this. *Id.*, at par. 12.

The second problem is that the "method" described is not what is required at all. There are certain, subtle signs such as eye movements, breathing patterns, muscle movements, temperature, perspiration, and pulse or heart rate (at certain critical times),

that must be assessed. *See* Third Declaration of Mark Heath, par. 23. Poking Mr. Morales to see if he responds is simply inadequate. In fact, even such rudimentary measures as response to stimulus require much more precision than the Defendants are willing to engage in. *See* Fourth Declaration of Mark Heath. M.D. par. 18.

Third, the undefined timing and location of the Warden's proposed prodding are troublesome. Proper determination of unconsciousness will take monitoring *over time.* The reason for this is the somewhat volatile nature of the sodium thiopental, particularly if there is a problem in administration as there appear to have been in several executions. As Dr. Heath noted, if there is a difficulty and the sedative is not appropriate, Mr. Morales may very well appear sedated but be re-awakened by the administration of the pancuronium, or even the potassium chloride. By then, of course, only someone with the expertise to recognize subtle signs of consciousness could be said to be monitoring consciousness.

Defendant's main concern seems to be in having someone in the chamber that will be witnessed. This, of course, ignores the fact that in a previous lawsuit it was made plain that the witnesses shall be allowed to see the insertion of the catheter by San Quentin's personnel who, it is assumed, have some degree of medical training (although that is certainly not clear given the recent difficulties). And, it would appear that allowing the public and personnel involved to be assured of a humane execution would alleviate stress rather than cause it. This is what is done for pet owners (*See* Fourth Declaration of Mark Heath. M.D. par. 15), and in end of life decisions in hospitals. *See* Exhibit 2 to Second Declaration of Mark Heath (submitted with plaintiff's Reply). There should be no less required for executions.

Conclusion

In conclusion, the Court's inquiry is exactly that which plaintiff alleges should be occuring at San Quentin. It is not up to plaintiff to propose methods of execution to defendants, only to point out that there are undeniable problems in the way it is being accomplished now that raise a sufficient risk of a cruel and unusual execution, and that there are other, viable alternatives that may go a long way towards alleviating the difficulties that are undeniably present in the evidence now before the Court. Along with defendants' own proffer, and the proffer raised orally by plaintiff, as well as the evidence and argument before the Court, the Court's latest inquiry illustrates exactly why a stay is required and a hearing should be held.

MICHAEL ANGELO MORALES

By: /s/
John R Grele

Dated: February 14, 2006

David A. Senior (# 108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R. Grele (# 167080)
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken
Benjamin J. Bradford
Janice H. Lam
Stephanie L. Reinhart
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Ginger D. Anders
Jenner & Block LLP
601 Thirteenth Street, NW
Suite 1200 South
Washington DC 20005-3823
Phone: (202) 639-6000
Fax: (202) 639-6066
ganders@jenner.com

David A. Senior (# 108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R. Grele (# 167080)
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Attorneys For Plaintiff MICHAEL ANGELO MORALES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, v. RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Defendants.	Case No. C 06 219 (JF) C 06 926 (JF) **FOURTH DECLARATION OF DR. MARK HEATH**

Dr. Mark Heath, under penalty of perjury, both deposes and states as follows:

1. I have reviewed the Court's Order of February 13, 2006, asking the parties to address two questions: (1) whether it would be feasible to proceed with the execution using only thiopental; and (2) whether it would be feasible to use an independent means such as a medical device or qualified individual to ensure that Mr. Morales is in fact unconscious prior to the administration of the pancuronium and potassium. I have also reviewed the document entitled Defendants' Response to Court Inquiry, submitted on February 13, 2006. Counsel for Mr. Morales has asked me to comment on the Court's inquiries and also on the Defendants' response. In this declaration I will, as much as possible, use independent literature and commentary from the American Veterinary Medical Association (AVMA) and the American Society of Anesthesiologists (ASA) to support my statements and opinion. The opinions offered here are ones I hold to a reasonable degree of medical certainty.

A. Use of Thiopental Alone

2. Removal from the execution protocol of the unnecessary and potentially painful drugs pancuronium and potassium would greatly reduce the possibility that the execution would be cruel and inhumane. The administration of sufficient thiopental will, as the CDCR and its expert have stated, with certainty cause death, because in the doses planned by the CDCR thiopental will ablate all respiratory activity. Thiopental itself cannot cause pain if it is properly injected into the venous system, and instead will act as a powerful anesthetic to render the prisoner deeply unconscious.

3. The above reflects my opinion based on my knowledge and experience with the use of thiopental, and it is substantiated by the practice of veterinary euthanasia. The 2000 Report of the American Veterinary Medical Association Panel on Euthanasia (attached as an exhibit to my declaration of January 12, 2006, and also attached as Exhibit 1 hereto) states at the top of page 680: "All barbituric acid derivatives used for anesthesia are acceptable for euthanasia when administered intravenously. There is a rapid onset of action, and loss of consciousness induced by barbiturates". The AVMA Euthanasia guidelines go on to discuss the "Advantages" and "Disadvantages" of barbiturates, and conclude that "The advantages of using barbiturates for euthanasia in small animals

far outweigh the disadvantages. Intravenous injection of a barbituric acid derivative is the preferred method for euthanasia of dogs, cats, other small animals, and horses." Parenthetically, it is notable that the AVMA euthanasia guidelines recommend the use of barbiturates that are "long-lasting" and "stable in solution," neither of which apply to thiopental, but do apply to the drug most widely used by veterinarians, pentobarbital. Nevertheless, thiopental would, if administered properly and in sufficient dose, provide a humane death for animals including humans. The AVMA does note that "an aesthetically objectionable terminal gasp may occur in unconscious animals." A gasp, yawn, brief sputter, cough, or sigh is often seen with the administration of thiopental, is often seen in executions, and is not prevented by pancuronium because it occurs immediately upon delivery of the thiopental to the brain and prior to the completion of the administration of the thiopental or the onset of the administration of the pancuronium. Therefore, such a "gasp" would not be any more or less of a concern if thiopental were the sole exaction than it could be under the current protocol.

4. The elimination of pancuronium from the protocol would serve many important and legitimate interests. Most importantly, it would eliminate the possibility that the prisoner could suffer and be unable to express that suffering to the execution personnel so that they could intervene. In the absence of pancuronium, if the prisoner was suffering to any significant extent he would be able to vocalize and move, thus apprising a properly trained execution team of the need to provide further anesthetic. Also very importantly, in the absence of pancuronium the witnesses to the execution would be unhindered in their capacity to determine whether or not the execution was humane.

5. The elimination of potassium from the protocol would further reduce the possibility of an extremely painful execution taking place. As stated by the CDCR and its expert, potassium is not necessary for achieving death (if thiopental is administered in sufficient quantity). Because the administration of concentrated potassium solution is extraordinarily painful, the AVMA Euthanasia Guidelines state that "it is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously" (page 681). Omission of the

needless use of potassium would to a very significant extent mitigate the CDCR's apparent failure to use qualified personnel in the conduct of the execution.

6. To summarize thus far, it is my opinion, substantiated by the AVMA Euthanasia guidelines, that the use of thiopental as the sole agent in the lethal injection procedure would represent an enormous and easily-taken step toward minimizing the risk of an excruciatingly painful execution. The use of thiopental alone would be a major step toward making the lethal injection protocol compliant with the AVMA Euthanasia Guidelines. The use of pancuronium and potassium in lethal injection, in the absence of qualified personnel, is problematic on many grounds, and the removal of these drugs from the protocol is a very positive suggestion.

B. Use of a Medical Device to Insure Consciousness

7. Regarding the use of a "medical device" to "insure that Plaintiff is in fact unconscious" it is important to understand that there is presently no device that can reliably provide sufficient information to serve as the *sole* indicator of anesthetic depth. While there are widely-used devices that monitor brain electrical activity ("brain function monitoring"), the readings from these devices must be incorporated into the totality of clinical information that the anesthesiologist uses to gauge anesthetic depth. This opinion is supported by the recently approved "Practice Advisory for Intraoperative Awareness and Brain Function Monitoring," attached hereto as Exhibit 2, which states that physicians should rely on "multiple modalities, including clinical techniques (e.g., checking for clinical signs such as purposeful or reflex movement) and conventional monitoring systems (e.g., electrocardiograms, blood pressure monitors, heart-rate monitors, end-tidal anesthetic analyzers and capnographs)" (page 21). Notably, the ASA Practice Advisory does not conclude that brain function monitoring devices should be considered to be a standard of care when providing general anesthesia. Brain function monitoring devices are indeed widely-used adjuncts to the array of techniques that are used to assess anesthetic depth, but at present these devices do not provide sufficient information to be used as the sole method for achieving this essential goal.

8. Further, brain function monitoring devices can be used only by personnel with significant training in their use and with substantial experience in the provision of general anesthesia.

Use of these devices requires the careful placement of electrodes at specific sites on the patient's head and the use of software algorithms to assess the reliability and integrity of the reading. Further, practitioners should be familiar with the advantages and limitations of the devices, the recognition of artifacts in the signal, and the significance of confounding signals. While an experienced anesthesiologist should easily be able to rapidly incorporate a brain monitoring device into their clinical practice, it would be extremely difficult and probably impossible to adequately train an unqualified individual who lacks the breadth of knowledge and experience imparted by years of practice in the field of anesthesiology.

9. In summary, while the addition of a brain function monitoring device would be a reasonable and positive step toward decreasing the likelihood of consciousness during the execution, its use as the sole method or device, particularly by personnel lacking extensive anesthesiology training, would not by itself be sufficient to reasonably insure that the prisoner is unconscious prior to the administration of the pancuronium and potassium. However, in the hands of an experienced and qualified practitioner such a device may well serve as a useful adjunct in the assessment of anesthetic depth during executions.

C. Presence of a Qualified Individual To Insure Unconsciousness

10. Regarding the possibility of "the presence of a qualified individual approved by the Court to insure that the Plaintiff is in fact unconscious," it is my strongly-held opinion that this would (like the removal of pancuronium and potassium) represent a very positive step toward resolving concerns about the humaneness of the lethal injection procedure. While no complex human endeavor can ever be completely error-free, it is not disputable that the probability of error is reduced when complex tasks are performed by trained and experienced personnel.

11. The assessment of anesthetic depth is inherently a complex task that requires the real-time and continuous integration of multiple lines of evidence and information. Thus, a "qualified individual" would be someone with significant training and experience in the provision of general anesthesia, such as an anesthesiologist or Certified Registered Nurse Anesthetist (CRNA). The presence of a qualified individual at the "bedside" of the condemned prisoner, with the ability and

intent to physically examine the prisoner and to view vital sign monitors, would meet the standard of care for general anesthesia, would meet the standard of care for veterinary euthanasia by potassium chloride administration, and could, if properly done, reasonably "insure that Plaintiff is in fact unconscious."

12. In this context it seems appropriate to consider whether it would be feasible to recruit adequately trained and credentialed personnel for the critically important role of insuring adequate anesthetic depth. Based on published survey data, I think it is likely that the CDCR would indeed be able to identify and engage a suitably-trained and credentialed practitioner for this purpose. In an article entitled "Physicians' attitudes about involvement in lethal injection for capital punishment," attached hereto as Exhibit 3, Neil Farber and colleagues surveyed U.S. physicians in 2000 and found that 34% approved of eight actions related to the conduct of lethal injection, including the injection of the lethal drugs. (Arch. Intern Med. 2000 Oct. 23; 160(19):2912-6). In a related study, Farber and colleagues found that 25% of physicians would personally perform five or more actions intrinsic to the conduct of lethal injection. ("Physicians' willingness to participate in the process of lethal injection for capital punishment," Ann Intern Med. 2001 Nov. 20; 135(10):884-8, attached hereto as Exhibit 4). Nineteen percent of responding physicians stated that they would personally administer the lethal drugs. The study concluded that "[d]espite medical society policies, many physicians would be willing to be involved in the execution of adults." Based on these surveys, to me it appears likely that the CDCR would not encounter significant difficulty in recruiting and contracting for an adequately trained physician to provide and assess the general anesthetic that necessarily must precede the administration of pancuronium and potassium. While these surveys did not specifically target anesthesiologists, it seems reasonable to assume that the attitudes of anesthesiologists toward participation in lethal injection would not significantly depart from the attitudes of physicians in general.

13. In summary, it is my strongly-held opinion that the inclusion of an individual with demonstrated experience and training in the provision of general anesthesia and the assessment of

anesthetic depth is an easily-taken step that would greatly reduce the possibility of an inhumane execution.

D. Comment Regarding Defendants' Response

14. I would respectfully like to comment on some of the statements made by Attorney General Lockyer and colleagues in the "Defendants' Response to the Court Inquiry." The Defendants express concern that the use of thiopental alone would "unnecessarily delay completion of the execution." I agree that the omission of potassium would likely increase the time required to produce death. I do not know, however, the source upon which the Defendants relied to assert that the 5-gram dose of thiopental would take up to 45 minutes to cause death, and I am not convinced that this value is correct. Veterinarians are able to use barbiturates in a manner that causes death in just a few minutes, and certainly substantially less than 45 minutes.

15. In terms of it being "unfair" to the execution team, it does seem reasonable to be concerned that prolonging the procedure might operate to modestly increase the stress of participants. However, the certain knowledge that the prisoner is deeply unconscious should provide psychological comfort and relief to the executioners that would outweigh the stress of a slightly longer execution. Further, the knowledge that the procedure, while somewhat slower, is being done in a way that has been raised to compliance with the AVMA guidelines for animals should render the situation much less stressful. As noted above, it is common and routine for veterinary practitioners to use only barbiturates, and this apparently does not cause significant stress to the participants (the veterinary staff) or the witnesses (the pet owners).

16. The Defendants state that they are "not aware of any easily obtainable medical equipment that could effectively be used by the prison execution team to monitor consciousness." I cannot ascertain from this statement whether the Defendants have considered the use of brain function monitoring and concluded that the personnel could not be trained to perform this, or whether they are unaware of the existence of this technology. If the CDCR has indeed considered the use of brain function monitoring, I agree with their conclusion that the members of the prison execution team, as currently constituted, most likely do not have the training and experience to use such devices

effectively. Many anesthesiologists, however, find this technique to be a very useful addition to the suite of monitors and signs that are used to assess anesthetic depth.

17. Regarding the proposal by the Defendants that Warden Ornoski undertake the task of insuring that the Plaintiff is in fact unconscious, it is my opinion that this represents an unfortunate disregard for the complexity of the procedure and the necessity of having a qualified, trained, experienced individual serving this purpose. I believe it is safe to assume that in any other setting in which a surgical plane of anesthesia is indicated, the CDCR would never consider having Warden Ornoski assess the prisoner's level of consciousness. I feel safe in assuming that instead the CDCR ensures that during elective surgical procedures all prisoners are provided with anesthesiologists or CRNAs, and therefore I find it difficult to understand the Defendants' proposal that the Warden undertake this critical and complex task. When commenting about the ASA "Practice Advisory for Intraoperative Awareness and Brain Function Monitoring" the ASA President, Orin Guidry, M.D., stated "The most important monitor in the operating room is the anesthesiologist, who has 12 years of medical training and a wealth of experience to draw on when deciding what is appropriate for each individual patient." I, and I believe all anesthesiologists and CRNAs, completely agree with Dr. Guidry's statement. The only way to learn how to assess anesthetic depth is to spend considerable time undergoing "elbow-to-elbow" training under the supervision of experienced practitioners. It would not be possible for Warden Ornoski, or any person, even an experienced nurse or physician or paramedic, to learn how to assess anesthetic depth by lectures or reading. The only way to learn this is from practical experience gained under hands-on supervision and teaching.

18. Moreover, in order to assess anesthetic depth by mechanically stimulating the prisoner, the Warden would have to apply a graded series of increasingly painful noxious stimuli to ensure that the prisoner is anesthetized to the point where he will not regain consciousness upon the extraordinarily painful administration of the potassium. For instance, in the veterinary setting, the veterinarian might clamp the animal's toe or tail with progressively increasing force, such that the animal would respond if not fully anesthetized (and not paralyzed). It is unclear whether the CDCR envisions the Warden undertaking this use of noxious stimuli when it states that the Warden will

"touch" Mr. Morales to assess his response. Simply "touching" Mr. Morales, without more, however, will not effectively measure anesthetic depth. Moreover, one danger of the procedure is that the inmate will regain consciousness after the pancuronium has been administered; mechanical stimulation is obviously not effective in assessing anesthetic depth at that point, because the inmate will not be able to move in response to stimuli. Because the only indications of consciousness following the administration of pancuronium would be extremely subtle -- such as increased heart rate and blood pressure, or dilated pupils -- they cannot be assessed by someone lacking training in anesthesia. On this point, paragraphs 8 and 9 of the affidavit of Dr. Kevin Concannon, attached as Exhibit 5 hereto, provide a helpful description of the subtlety of indicia of consciousness in animals and the need for adequate training to detect these indicia. It is therefore my opinion that the presence of a fully trained individual is necessary to insure unconsciousness throughout the procedure. In sum, the notion that by simply "touching" the prisoner the Warden, or anybody, could meaningfully assess anesthetic depth indicates a complete lack of understanding of the issues at hand, including the need to establish and verify a surgical plane of anesthesia (as required by the AVMA when potassium is used for euthanasia).

19. In summary, I believe that the CDCR's counterproposal is not adequate to ensure a humane execution. The court's suggestions should be easy to implement. I am therefore surprised that the CDCR is not willing to adopt all of them. The steps proposed in the court's inquiry would, if taken together and properly implemented, in essence render the execution protocol compliant with the AVMA guidelines, and would therefore represent the establishment of a recognized standard of conduct. Lethal injection can be humane or inhumane, depending on how it is done and who performs it. When performed by qualified veterinary personnel in compliance with the AVMA guidelines lethal injection is reliably humane and reliably satisfactory for the practitioners and pet owners. By contrast, lethal injection as currently performed by the CDCR is rife with unacceptable practices that with certainty create needless risk of grave harm.

I declare under penalty of perjury under the laws of the state of California and the United States of America that the foregoing is true and correct. Executed this 14th day of February, 2006 in New York City, New York.

By: _____

Dr. Mark Heath

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:04-CT-04-BO

GEORGE FRANKLIN PAGE,
N.C. Doc. # 0310202, and
KENNETH BERNARD ROUSE,
N.C. Doc. No. 0353186,

Plaintiffs,

v.

THEODIS BECK, Secretary,
North Carolina Department of Correction,
and MARVIN POLK, Warden,
Central Prison, Raleigh, North Carolina, and
UNKNOWN EXECUTIONERS,
Individually, and in their Official Capacities,

Defendants.

SECOND AFFIDAVIT OF KEVIN CONCANNON, D.V.M., D.A.C.V.A.

I, Kevin Concannon, D.V.M., D.A.C.V.A., after being duly sworn, hereby depose and say:

1. I am a veterinarian and one of 175 diplomates of the American College of Veterinary Anesthesiologists (one of three in the state of North Carolina). I have been a diplomate since 1992. I graduated from the University of Missouri College of Veterinary Medicine in 1987. After my residency in anesthesia/critical patient care at the University of California – Davis, I taught veterinary anesthesia to veterinary students, residents, and interns for two years at the University of California – Davis and at the North Carolina State University College of Veterinary Medicine. During this time, I also shared oversight of the clinical anesthesia services at both institutions. I left NCSU to spend two years at the Duke University Medical Center as a research associate in the department of Radiation Oncology, where I prepared a fellowship proposal to the National Institutes of Health (NIH) dealing with measurement of consciousness in anesthetized laboratory animals. I have worked for the past eight and a half years at the Veterinary Specialty Hospital of the Carolinas (VSH), a referral veterinary hospital in Cary, North Carolina. My roles have included emergency/critical care clinician, anesthesia consultant, and hospital administrator. A copy of my resume is attached as Exhibit A.

2. I was contacted by counsel for George Franklin Page and Kenneth Bernard Rouse and asked to give my opinions regarding methods of veterinary euthanasia and the chemicals and procedures currently used in North Carolina's lethal injection protocol. In reaching these opinions, I relied upon my knowledge of anesthetics, my knowledge and use of veterinary euthanasia solutions, and the recommendations of the American Veterinary Medical Association (AVMA). I have also reviewed deposition testimony, affidavits, written discovery responses, and documents produced by Marvin Polk, Mark Dershwitz, M.D., Ph.D., and Theodis Beck. In addition, I have reviewed portions of the North Carolina Veterinary Practice Act; the opinion of Dr. Dennis Geiser, professor of veterinary science and chairman of the Department of Large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee given in litigation in Texas; and the product literature for Euthasol, a euthanasia solution.

3. My primary concern when euthanizing a companion animal is to minimize pain and distress to the patient. An unconscious, properly anesthetized animal does not undergo physical or mental stress during the euthanasia procedure. Other than in specific circumstances where drugs are not available or their use will contaminate the food supply, euthanasia procedures should involve two processes – rendering the animal unconscious, followed by inhibition of brain, heart, or both brain and heart function.

4. The euthanasia protocol used at most small animal veterinary practices, including VSH, involves intravenous injection of a euthanasia solution containing pentobarbital, a long-acting barbiturate, as its active ingredient. The AVMA recommends the use of a long-acting barbiturate anesthetic for euthanasia. Pentobarbital, not thiopental sodium, is a long-acting barbiturate. Pentobarbital rapidly produces unconsciousness and then continues to depress the areas of the brain responsible for respiratory and cardiovascular control. With one injection, the patient rapidly progresses from a light to deep level of anesthesia, followed by cessation of breathing. The heart will stop beating shortly after breathing stops. Because death results from a massive overdose of an anesthetic, the risk of regaining consciousness or of inadequate anesthesia is nonexistent.

5. The manufacturers of commercially-available veterinary euthanasia solutions provide dosage recommendations based on the size of the patient. I adjust dosage based on these recommendations. I also take into effect the excitation level of the patient since this will increase the amount of drug needed to produce anesthesia. I treat each patient as an individual and base my course of action accordingly.

6. I am in constant contact with the patient during euthanasia to ensure that the injection is given intravenously and not into the tissue surrounding the vein. I assess muscle tone as the patient relaxes and watch as the breathing pattern changes to irregular and shallow before breathing stops. I monitor the patient after injection to make sure that unconsciousness is rapidly achieved. I monitor the effectiveness of the heartbeat by feeling the pulse with my fingertips. When the pulse is no longer palpable, I place my stethoscope over the heart to see if a heartbeat is present. When I have direct knowledge

that all of the euthanasia solution went into the vein and when I can detect no pulse or heartbeat, I will pronounce the patient dead.

7. Under North Carolina law, only a licensed veterinarian may perform an act producing an irreversible change in an animal. (G.S. § 90-187.6) By enacting this statute, the General Assembly has acknowledged the necessity of having highly-qualified personnel perform certain veterinary procedures in order to ensure that complicated procedures are done properly and that any potential pain or suffering is minimized.

8. Determining level of consciousness is as much an art as it is a skill, and requires training and experience. There is no one monitor in animals or people that assesses degree of consciousness. Consciousness can be assessed in animals by observing: (1) muscle relaxation, (2) location of the pupils in the orbit, (3) absence or presence of eye movements, (4) respiratory rate, (5) heart rate, (6) blood pressure, (7) response to mildly painful stimulation, and (8) movement. I put my hands on the patient to help me assess these variables, and I rely upon monitors to help provide data such as blood pressure or heart rate.

9. I believe to a reasonable degree of medical certainty that a veterinarian can not accurately determine a patient's state of consciousness without seeing and feeling the patient. I would not entrust this task during euthanasia to a veterinary technician or assistant due to their more limited education and training.

10. According to the North Carolina Department of Correction website, the protocol for lethal injection involves a combination of thiopental sodium, pancuronium bromide, and potassium chloride. This combination is not listed as acceptable for veterinary euthanasia by the AVMA. In addition, I believe to a reasonable degree of medical certainty that using a combination of drugs to euthanize an animal adds complexity to the procedure, which increases the need for close monitoring of the patient.

11. If a short-acting anesthetic were to be used prior to other drugs in a veterinary euthanasia procedure, the veterinarian would need to assess the adequacy of anesthesia and loss of consciousness prior to administration of other drugs. Based on my reading, it appears that the North Carolina execution protocol involves several barriers to direct assessment of the patient, such as the use of a curtain between the patient and executioners and a sheet covering the patient's body, that would prevent adequate monitoring of consciousness using the measures described above.

12. If a short-acting anesthetic is used prior to other drugs, I believe to a reasonable degree of medical certainty that consciousness cannot be assessed adequately when the injections occur one immediately after the other. Consciousness must be assessed by the veterinarian after the anesthetic and prior to injection of any other drug. In veterinary practice, it may take several minutes after administering a short-acting anesthetic in order for the anesthetic to take effect and unconsciousness to be assessed. I do not believe that a veterinarian should make assumptions about consciousness without relying on a direct assessment of the patient and the patient's vital signs.

13. The AVMA has explicitly concluded that the use of neuromuscular paralyzing drugs, to include pancuronium bromide, solely or in conjunction with other drugs is unacceptable as a method of euthanasia. Pancuronium acts by blocking the transmission of impulses from the nerves to the muscles producing paralysis. Pancuronium is not an analgesic or a "pain killer." Pancuronium does not contribute to anesthesia or unconsciousness. Its use can result in a conscious patient appearing unconscious to observers. Pancuronium paralyzes the muscles of respiration making it impossible to breathe. A conscious veterinary patient given pancuronium would be aware of the need to breathe, the inability to do so, and the terrifying experience of suffocation.

14. Potassium chloride is added in small amounts to the intravenous fluids of veterinary patients where low potassium levels exist in the blood or body. In large doses, potassium interferes with the electrical activity of the heart resulting in cardiac arrest. According to the 2000 Report of the AVMA Panel on Euthanasia, use of potassium chloride in a euthanasia protocol "requires a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." Potassium chloride is unacceptable in euthanasia protocols that fail to provide for the presence of properly trained veterinary personnel to induce proper anesthesia, assess the physical signs indicating the veterinary patient's state of consciousness, and maintain an unconscious state throughout the euthanasia process.

15 It is my opinion to a reasonable degree of medical certainty that the combination of chemicals used by the North Carolina Department of Correction is not an acceptable protocol for veterinary euthanasia. According to the AVMA standards, it is not acceptable to use a neuromuscular blocking agent such as pancuronium bromide in combination with the potent long-acting barbiturate anesthetic pentobarbital, much less a short-acting barbiturate anesthetic such as thiopental sodium. Using thiopental sodium in combination with pancuronium bromide increases concerns that a veterinary patient could awaken during the euthanasia process but be unable to display the physical symptoms relied upon by trained veterinary personnel to identify the need for further anesthesia.

16. Based on all of the above, I believe to a reasonable degree of medical certainty that the execution protocol currently used in North Carolina would not be an acceptable method for euthanasia of animals.

This 28 day of October, 2005.

Kevin Concannon

Kevin Concannon, D.V.M., D.A.C.V.A.

Sworn to and subscribed before
me, this the 28 day of October, 2005.

Dwayne Cooley

Notary Public

DWAYNE COOLEY NOTARY *** PUBLIC FRANKLIN COUNTY, N.C.

My Commission Expires:

My Commission Expires 8-4-2008

EXHIBIT A

RESUME OF KEVIN CONCANNON, D.V.M., D.A.C.V.A.

KEVIN T. CONCANNON, DVM, DACVA
Diplomate, American College of Veterinary Anesthesiologists
Veterinary Specialty Hospital of the Carolinas
6405 Tryon Road
Suite 100
Cary, NC 27511
(919) 233-4911

HIGHLIGHTS OF QUALIFICATIONS

- Eighteen years of experience in veterinary medicine, including advanced training in and practice of anesthesiology, critical care and emergency medicine.
- Have held clinical, teaching, and research positions in both academic and private practice.
- Intimately familiar with the practice of specialty and emergency veterinary medicine as hospital administrator of the Veterinary Specialty Hospital of the Carolinas (VSH).

PROFESIONAL EXPERIENCE AND ACCOMPLISHMENTS

Anesthesiology

- Diplomate in the American College of Veterinary Anesthesiologists. Certified in 1992.
- As a faculty member at the University of California-Davis, Veterinary Medical Teaching Hospital (UCD-VMTH) and the North Carolina State University, College of Veterinary Medication (NCSU-CMV):
    - Directed students, technicians, and residents in the clinical practice of anesthesia.
    - Implemented novel anesthetic and monitoring techniques to improve care of the patient.
- Direct provider of anesthesia to several thousand veterinary patients comprising many different species.
- Published review articles on non-cardiogenic pulmonary edema, positive pressure ventilation and use of synthetic colloids. Published original research on use of IV dextrans in dogs and a novel analgesic in birds.

Critical Care/Emergency Medicine

- Rotated as supervisor of the emergency room at the Veterinary Hospital of the University of Pennsylvania, one of only three veterinary schools in the country at the time offering advanced training in emergency medicine.
- Coordinated and provided care for patients hospitalized in the UCD-VMTH intensive care unit.
- Facilitated transition of anesthetized patients from surgery into the intensive care unit at the NCSU-CVM.

Teaching

- Developed and presented numerous lectures for graduate students.
- Conducted continuing education seminars for local and state meetings of private veterinary practitioners and for veterinary technicians
- Shared responsibility for didactic training of veterinary students at NCSU-CVM

PROFESSIONAL TRAINING AND EMPLOYMENT

1999 – Present Hospital Administrator
Veterinary Specialty Hospital of the Carolinas
Have overseen the growth of the hospital from four to sixteen doctors while adding new services to the hospital and quadrupling hospital size. Direct oversight over management team with emphasis on quality assurance of our medical care.

1996 – 1999 Hospital Administrator & Emergency clinician
Veterinary Specialty Hospital of the Carolinas
Responsible for all aspects of business start-up and management. Worked every other week as a full-time emergency doctor managing hospitalized cases and seeing walk in emergencies at night and on weekends.

1994 – 1996 Research Associate
Department of Radiation Oncology, Duke University Medical Center
Applied my expertise to the pharmacokinetic study of hyperthermia-sensitizing drugs and the physiology of tumor blood flow as part of an NIH program project grant.

1992 – 1993 Visiting Faculty in Anesthesiology
North Carolina State University, College of Veterinary Medicine
Duties in the teaching clinic were similar to those at the UCD-VMTH. Responsibility was shared for training of second and third-year veterinary students in laboratory and lecture settings.

1991 – 1992 Clinical Instruction in Small Animal Anesthesiology
University of California-Davis, Veterinary Medical Teaching Hospital
Managed students, technicians, and residents in the performance of clinical anesthesia in the teaching clinics. The anesthetic service was responsible for the management of approximately 450 cases per month. Species anesthetized included exotic species, as well as dogs and cats.

1988 – 1991 Resident in Anesthesia/Critical Patient Care
University of California-Davis, Veterinary Medical Teaching Hospital
Time was equally divided between the small animal ICU, companion animal anesthesia, and equine/food animal anesthesia services. While in the ICU, my role was to ensure that the care provided by the residents, technicians, and students was appropriate and to perform monitoring and diagnostic techniques to the ICU patient population.

1987 – 1988 Intern in Small Animal Medicine and Surgery
Veterinary Hospital of the University of Pennsylvania
Rotations in the program included emergency services, anesthesia, oncology, internal medical, and soft tissue/orthopedic surgery.

EDUCATION

1983 – 1987 University of Missouri, College of Veterinary Medical, DVM
GPA: 3.76/4.0

1980 – 1983 University of Missouri-Columbia, gained early entrance to veterinary school without need to complete Bachelor's degree.
GPA: 3.85/4.0

Academic Awards and Honors

- Pfizer Veterinary Scholarship
- The Upjohn Award for Proficiency in Veterinary Clinical Medicine
- The AVMA Auxiliary Award of Outstanding Achievement
- Member, Phi Zeta Veterinary Honor Society
- University of Missouri, Curator's Scholarship

E-filed 2/14/06

DESIGNATED FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES, Plaintiff, v. Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoski, Acting Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 06 219 JF Case Number C 06 926 JF RS DEATH-PENALTY CASE ORDER DENYING CONDITIONALLY PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [Docket No. 12]

Plaintiff Michael Angelo Morales is a condemned inmate at California's San Quentin State Prison. He is scheduled to be executed at 12:01 a.m. on February 21, 2006. The present action challenges the manner in which California's lethal-injection protocol is administered. In his amended complaint, Plaintiff contends that the way in which the protocol is carried out creates an undue risk of causing him excessive pain as he is being executed, thereby violating the Eighth Amendment's command that "cruel and unusual punishments [not be] inflicted." U.S. Const. amend. VIII.

Plaintiff seeks a preliminary injunction to stay his execution so that the Court may conduct a full evidentiary hearing to consider his claims. Defendants Roderick Q. Hickman, Secretary of the California Department of Corrections and Rehabilitation, and Steven W.

Ornoski, Acting Warden of San Quentin State Prison, oppose the motion. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on January 26 and February 9, 2006. The Court also has considered the parties' responses to its request for supplemental briefing dated February 13, 2006. The Court has jurisdiction pursuant to 42 U.S.C. § 1983 (2006). *Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005). For the reasons set forth below, Plaintiff's motion will be denied, subject to certain conditions concerning the manner in which the execution is to be carried out.

I

The Eighth Amendment prohibits punishments that are "incompatible with the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotation marks and citations omitted). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), are not permitted. When analyzing a particular method of execution or the implementation thereof, it is appropriate to focus "on the objective evidence of the pain involved." *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996) (citing *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994)), *vacated on other grounds*, 519 U.S. 918 (1996). In this case, the Court must determine whether Plaintiff "is subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by lethal injection under California's protocol must be restrained." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004).

In California, unless a condemned inmate affirmatively selects to be executed by lethal gas, executions are performed by lethal injection. Cal. Penal Code § 3604 (West 2006). Defendants have developed California's lethal-injection protocol[1] to implement this statutory directive. *See id.* at § 3604(a) (lethal injection to be administered "by standards established

---

[1]Defendants have developed two versions of the protocol: a confidential version labeled "San Quentin Institution Procedure No. 770" and a redacted, publicly available version labeled "San Quentin Operational Procedure No. 770." During the course of this litigation, the Court reviewed the confidential version *in camera* and ordered Defendants to make it available to Plaintiff's counsel with certain redactions related to prison security and subject to a protective order. There are potentially significant differences between the two versions.

under the direction of the Department of Corrections").[2] The protocol calls for the injection of a sequence of three drugs into the person being executed: five grams of sodium thiopental, a barbiturate sedative, to induce unconsciousness; 50 or 100 milligrams of pancuronium bromide, a neuromuscular blocking agent, to induce paralysis; and 50 or 100 milliequivalents of potassium chloride, to induce cardiac arrest.[3] Significantly, each drug is given in a dosage that is lethal in and of itself.

In his amended complaint, Plaintiff contends that these drugs are administered in such a way that there is an undue risk that he will be conscious when the pancuronium bromide and the potassium chloride are injected. Defendants agree with Plaintiff that a person injected with either of these two drugs while conscious would experience excruciating pain; however, they assert that the dosage of sodium thiopental is more than sufficient to insure that Plaintiff will be unconscious prior to their administration.

A significant number of media reports have described this action as an attack on the constitutionality of lethal injection. *See, e.g., Lethal Injection of Murderer-Rapist Could Be*

---

[2]The Department of Corrections was reorganized into the Department of Corrections and Rehabilitation on July 1, 2005.

[3]The lethal-injection protocol is not entirely clear as to which dosages of pancuronium bromide and potassium chloride are used. The protocol provides for the preparation of two syringes of 50 milligrams each of pancuronium bromide (which is also known as Pavulon). It then instructs:

> The "NS" syringe shall be removed and one of the #2 syringes (Pavulon) shall be inserted. The entire contents shall be injected with slow, even pressure on the syringe plunger.
> CAUTION: If all of the Sodium Pentothal has not been flushed from the line, there is a chance of flocculation forming when coming in contact with the Pavulon, which will block the flow of fluid through the Angiocath. If this should happen, shift over to the contingency line running to the right arm. When the contents of the first #2 syringe has [sic] been injected, repeat with the second #2 syringe.

San Quentin Operational Procedure No. 770 § VI.E.4.d.5)(g)(5) (publicly available version). Regarding syringes of 50 milliequivalents of potassium chloride, the protocol directs, "The first #3 syringe (KCl) shall be inserted and the entire contents shall be injected. The second #3 syringe shall be repeated or until death has been pronounced by the physician [sic]." *Id.* at § VI.E.4.d.5)(g)(7). Additionally, the protocol and Defendants' submissions are inconsistent as to whether the volume used to administer sodium thiopental is 20 or 50 cubic centimeters, *see id.* at § VI.E.4.d.5)(c)(6)(d); this difference would affect how much sodium thiopental actually gets to an inmate being executed due to the volume of fluid containing sodium thiopental that is retained in the intravenous line after the flush of 20 cc of saline, as a percent of the total dose of sodium thiopental that is intended to be administered.

Blocked, San Diego Union-Trib., Feb. 10, 2006, at A4 ("A federal judge said yesterday that he might block a murderer and rapist's Feb. [sic] 21 execution to provide enough time to determine whether lethal injection is cruel and unusual punishment."). As is apparent from the foregoing discussion, these reports are in error. Rather, the discrete issues in the present action are whether or not there is a reasonable possibility that Plaintiff will be conscious when he is injected with pancuronium bromide or potassium chloride, and, if so, how the risk of such an occurrence may be avoided.

II

The United States Court of Appeals for the Ninth Circuit has explained that a condemned inmate seeking a stay of execution is

> required to demonstrate (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, injunctive relief could be granted if he demonstrated either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party. In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff. [¶] In capital cases, the Supreme Court has instructed that equity must take into consideration the State's strong interest in proceeding with its judgment.

Beardslee, 395 F.3d at 1067-68 (internal quotation marks, citations, brackets and emphasis omitted). As the United States Supreme Court has adjured,

> before granting a stay [of execution], a district court must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

Nelson v. Campbell, 541 U.S. 637, 649-50 (2004) (citations omitted).

III

Two years ago, condemned inmate Kevin Cooper faced imminent execution at San Quentin. Eight days before he was scheduled to be executed, Cooper filed an action in which he challenged California's lethal-injection protocol on Eighth Amendment grounds. This Court declined to stay the execution, finding that Cooper had delayed unduly in asserting his claims and that he had done no more than raise the possibility that he might suffer unnecessary pain if errors were made in the course of his execution. *Cooper v. Rimmer*, No. C 04 436 JF, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004). The Ninth Circuit affirmed for the same reasons. *Cooper*, 379 F.3d 1029.[4]

Just over one year ago, another inmate under sentence of death, Donald J. Beardslee, filed an action in this Court challenging the lethal-injection protocol shortly after the San Mateo Superior Court set his execution date. Beardslee contended that the protocol violated both his First Amendment right to freedom of speech and his Eighth Amendment right not to be subjected to cruel and unusual punishment. While this Court recognized that Beardslee had been more diligent than Cooper in that he filed his action thirty days before his scheduled execution and had exhausted his administrative remedies prior to filing, it nonetheless concluded that Beardslee also had delayed unduly in asserting his claims. On the merits, the Court concluded, "Based upon the present record, a finding that there is a reasonable possibility that . . . errors will occur [during Beardslee's execution] would not be supported by the evidence. [Beardslee's] action thus is materially indistinguishable from *Cooper*." *Beardslee v. Woodford*, No. C 04 5381 JF, 2005 WL 40073 (N.D. Cal. Jan. 7, 2005).

The Ninth Circuit disagreed with this Court's determination that Beardslee's action was untimely. *Beardslee*, 395 F.3d at 1069-70. The appellate court noted that "the precise execution

---

[4]In a separate habeas corpus proceeding originally brought before the Ninth Circuit, that court granted Cooper a stay of execution to permit him to return to the United States District Court for the Southern District of California to pursue his claim that he is innocent of the crimes of which he was convicted and for which he was sentenced to death. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc). This Court subsequently dismissed without prejudice Cooper's challenge to the lethal-injection protocol in light of Cooper's failure to exhaust his administrative remedies. *Cooper v. Woodford*, No. C 04 436 JF (N.D. Cal. Oct. 12, 2004).

protocol is subject to alteration until the time of execution" and it found that "by regulation the California Department of Corrections does not permit challenges to anticipated actions."[5] *Id.* at 1069. *Beardslee* thus suggests that in California, a condemned inmate's challenge to the lethal-injection protocol may not become ripe for judicial review until the inmate's execution is imminent. *See id.* at 1069 n.5; *but cf. id.* at 1069-70 n.6 ("we have not resolved the question of when challenges to execution methods are ripe"). At the very least, unlike Cooper, "Beardslee pursued his claims aggressively as soon as he viewed them as ripe." *Id.* at 1069.

Although it concluded that Beardslee's challenge was timely, the Ninth Circuit affirmed this Court's decision on the merits, holding that "we cannot say, given our deferential standard of review, that the district court abused its discretion in denying [a] stay of execution." *Id.* at 1070. In doing so, however, it noted that

> the California execution logs of William Bonin, Keith Williams, Jaturun Siripongs, and Manuel Babbit[t] . . . contain indications that there may have been problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions. This evidence, coupled with the opinion tendered by Beardslee's expert, raises extremely troubling questions about the protocol.

Id. at 1075.

In the present action, Plaintiff has been even more diligent than Beardslee: he filed his challenge to the lethal-injection protocol shortly before the Ventura Superior Court scheduled his execution—thirty-nine days before the execution date that court ultimately set.[6] Because in light of *Beardslee*, Plaintiff is not guilty of undue delay in bringing his claim, there is no presumption against the grant of a stay due to delay, much less the "strong equitable presumption" identified by the Supreme Court in *Nelson*, 541 U.S. at 650.[7]

---

[5]The regulation reads in relevant part, "An appeal may be rejected for any of the following reasons: . . . (3) The appeal concerns an anticipated action or decision." Cal. Code Regs. tit. 15, § 3084.3(c) (2006).

[6]It also appears from the face of his amended complaint that Plaintiff has exhausted his administrative remedies.

[7]This conclusion is buttressed by the Supreme Court's recent denial, by a vote of 6-3, of an application to vacate a stay of execution in *Crawford v. Taylor*, 546 U.S. ___ , No. 05A705 (Feb. 1,

IV

Plaintiff's diligence in filing the present action has made it possible for this Court to proceed in a somewhat more orderly fashion than otherwise would have been possible. At the initial hearing on January 26, 2006, the Court announced that it would construe Plaintiff's application for a temporary restraining order as it would a motion for a preliminary injunction, ordered supplemental briefing on Plaintiff's motion to expedite discovery as well as his motion for a preliminary injunction, and scheduled oral argument on the motion for a preliminary injunction. On February 1, 2006, the Court issued an order granting in part Plaintiff's motion for expedited discovery; the discovery granted was completed the following day.[8] The Court heard argument on the motion for a preliminary injunction on February 9, 2006, and requested additional supplemental briefing by an order dated February 13, 2006.[9] As a result of this procedural history, the record in the present action is substantially more developed than the record in *Cooper* or *Beardslee*.

Through their involvement in the *Cooper* and *Beardslee* cases, both this Court and the

---

2006). Like Plaintiff, Taylor filed an action pursuant to § 1983 in which he challenged his state's lethal-injection protocol when his execution was imminent but an execution date had not yet been set. During the course of the litigation, the United States District Court for the Western District of Missouri scheduled an evidentiary hearing for February 2006. The Missouri Supreme Court subsequently selected February 1, 2006, for Taylor's execution date, and the district court issued a stay of execution. A panel of the Eighth Circuit vacated the stay, 2-1, and remanded with instructions for the action to be reassigned and for the new judge to hold an expedited evidentiary hearing. Following an abbreviated telephonic hearing, the district court denied Taylor relief. The Eighth Circuit panel affirmed, again 2-1, but the en banc court granted Taylor a stay by a vote of 9-1. As noted, the Supreme Court declined to vacate the stay. For the same reasons that the present action is analogous to *Taylor*, it is distinguishable from other recent cases in which the Supreme Court has allowed executions to go forward. *See, e.g., Neville v. Livingston*, 546 U.S. ___ , No. 05-9136 (Feb. 8, 2006); *Elizalde v. Livingston*, 546 U.S. ___, No. 05A696 (Jan. 31, 2006).

[8]The discovery granted was concerned primarily with the three executions that Defendants have conducted since *Beardslee*—those of Beardslee himself on January 19, 2005; Stanley Tookie Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006. In addition, as noted, much of the confidential version of California's lethal-injection protocol was disclosed. Although not required to do so by the discovery order, Defendants also voluntarily produced additional execution logs that previously had not been made available.

[9]The additional briefing addresses whether it would be feasible for Plaintiff's execution to proceed using only sodium thiopental or utilizing an independent means to insure that Plaintiff will be unconscious before pancuronium bromide and potassium chloride are injected.

Ninth Circuit have acquired substantial familiarity with the legal and factual issues surrounding lethal injection in California. In addition, many other courts have reviewed lethal-injection protocols similar to California's. To date, no court has found either lethal injection in general or a specific lethal-injection protocol in particular to be unconstitutional. *See, e.g., Bieghler v. State*, 839 N.E. 691, 694-96 (Ind. Dec. 28, 2005); *Boyd v. Beck*, ___ F. Supp. 2d ___, No. 5:05-CT-774-D, 2005 WL 3289333 (E.D.N.C. Nov. 29, 2005); *Abdur'Rahman v. Bredesen*, ___ S.W.3d ___, No. M2003-01767-SC-R11-CV, 2005 WL 2615801 (Tenn. Oct. 17, 2005); *Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (lethal injection in Texas); *Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D. Va. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (lethal injection in Texas); *People v. Snow*, 65 P.3d 749, 800-01 (Cal. 2003); *Sims v. State*, 754 So.2d 657 (Fla. 2000); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000); *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998) (lethal injection in Arizona); *but cf. Rutherford v. Crosby*, 546 U.S. ___, No. 05-8795 (Jan. 31, 2006) (granting stay of execution pending disposition of cert. pet.); *Hill v. Crosby*, 546 U.S. ___, No. 05-8794 (Jan. 25, 2006) (granting stay of execution & granting cert.); *Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *3-*4 (W.D. Okla. Jan. 11, 2006) (denying mot. to dismiss 8th amend. challenge to lethal-injection protocol). At the same time, it should be noted that the record now before this Court, which includes both additional expert declarations and detailed logs from multiple executions in California, contains evidence of a kind that was not presented in these earlier cases. *See, e.g., Reid*, 333 F. Supp. 2d at 548-49 (limiting scope of review to "issues pertaining to the particular chemical combination . . . and their [sic] probable affect [sic] on Reid" and excluding other evidence); *Webb*, 750 A.2d at 453-57 (resolving challenge in state where no lethal injections had been performed); *Bieghler*, 839 N.E.2d at 696; *Boyd*, 2005 WL 3289333, at *3.; *cf. Anderson*, 2006 WL 83093, at *3-*4 (discussing evidence proffered in complaint).

This Court and others have found persuasive the declarations of Defendants' medical expert, Dr. Mark Dershwitz, to the effect that "over 99.999999999999% of the population would be unconscious within sixty seconds from the start of the administration of [five grams of] thiopental sodium" and that "this dose will cause virtually all persons to stop breathing within a

minute of drug administration. Therefore . . . virtually every person given five grams of thiopental sodium will have stopped breathing prior to" the administration of the pancuronium bromide. *Cooper*, 379 F.3d at 1032; *see also, e.g.*, *Reid*, 333 F. Supp. 2d at 547 (discussing two grams of sodium thiopental used in Virginia). In most if not all of the legal challenges to lethal injection, condemned inmates have suggested various errors that could occur during the administration of sodium thiopental, thereby rendering an inmate conscious when the pancuronium bromide and potassium chloride are administered. However, "the risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review," *Campbell*, 18 F.3d at 687, and the courts that have considered the issue to date have found that "the likelihood of such an error occurring 'is so remote as to be nonexistent,'" *Beardslee*, 2005 WL 40073, at *3 (quoting *Reid*, 333 F. Supp.2d at 551).

Plaintiff does not dispute Dr. Dershwitz's conclusions at the theoretical level, agreeing that a person's breathing and consciousness should cease within one minute of the beginning of the administration of sodium thiopental. Instead, he contends that in actual practice in California, for whatever reason, the sodium thiopental has not had its intended effect. He cites, *inter alia*, the following evidence from the execution logs:

> Jaturun Siripongs, executed February 9, 1999: The administration of sodium thiopental began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations[10] did not cease until 12:09 a.m., four minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide began.
>
> Manuel Babbitt, executed May 4, 1999: The administration of sodium thiopental began at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet respirations did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began. In addition, brief spasmodic movements were observed in the upper

---

[10]"Respirations" is the term used by the employees of the Department of Corrections and Rehabilitation who witnessed the executions and made entries in the execution logs.

chest at 12:32 a.m.[11]

Darrell Keith Rich, executed March 15, 2000: The administration of sodium thiopental began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began. Chest movements were observed from 12:09 a.m. to 12:10 a.m.[12]

Stephen Wayne Anderson, executed January 29, 2002: The administration of sodium thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at 12:19 a.m., yet respirations did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.

Stanley Tookie Williams, executed December 13, 2005: The administration of sodium thiopental began at 12:22 a.m., the administration of pancuronium bromide began at 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34 a.m., yet respirations did not cease until either 12:28 a.m. or 12:34 a.m.—that is, either six or twelve minutes after the administration of sodium thiopental began, either when or six minutes after the administration of pancuronium bromide began, and either four minutes before or when the administration of potassium chloride began.[13]

---

[11]Plaintiff's medical expert, Dr. Mark Heath, notes that Babbitt maintained a steady heart rate of 95 or 96 beats per minute for seven minutes after he was injected with sodium thiopental. Dr. Heath states that this fact raises concerns about whether Babbitt was properly sedated.

[12]According to Dr. Heath, this evidence is consistent with a conscious attempt to fight the paralytic effect of the pancuronium bromide rather than with unconsciousness due to the successful administration of the sodium thiopental, particularly in light of Rich's apparently iatrogenic rapid heart rate of 110 beats per minute as the chest movements were occurring. Rich's heart rate was 130 beats per minute when the administration of potassium chloride began.

[13]Defendants' records are inconsistent in this regard: the formal execution log suggests that Williams stopped breathing at 12:28 a.m. and indicates that potassium chloride was injected at 12:32 a.m. whereas the execution team's log states that Williams stopped breathing at 12:34 a.m when the potassium chloride was injected. It appears that the formal log has been altered without any indication as to who made the alteration. Similarly to Rich, Williams apparently experienced an iatrogenic rapid heart rate of 115 beats per minute when he was injected with pancuronium bromide.

Clarence Ray Allen, executed January 17, 2006: The administration of sodium thiopental began at 12:18 a.m., yet respirations did not cease until 12:27 a.m., when pancuronium bromide was injected, nine minutes after the administration of sodium thiopental began.

In a new declaration filed in the present action on February 6, 2006, Dr. Dershwitz opines that the "respirations" reported in the execution logs may be not be respirations at all, hypothesizing that they are no more than "chest wall movements." However, he proposes this hypothesis with considerably less certainty than was evident in his discussion of the pharmacokinetics and pharmacodynamics of sodium thiopental, which are his principal areas of expertise. *Cf. Beardslee*, 395 F.3d at 1075. While Dr. Dershwitz's explanation may be correct, evidence from eyewitnesses tending to show that many inmates continue to breathe long after they should have ceased to do so cannot simply be disregarded on its face. In rejecting the plaintiffs' claims on the merits in *Cooper* and *Beardslee*, this Court relied on Dr. Dershwitz's opinion that the amount of sodium thiopental used in California's lethal-injection protocol should both stop breathing and cause unconsciousness within a minute after administration begins. While there is no direct evidence that any condemned inmate actually was conscious when pancuronium bromide was injected, evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol actually is functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.[14]

Other evidence in the present record raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered. For example, it is unclear why some inmates— including Clarence Ray Allen, who had a long history of coronary artery disease and suffered a heart attack less than five months before he was executed, *see Allen v. Hickman*, ___ F. Supp. 2d ___, No. C 05 5051 JSW, 2005 WL 3610666 (N.D. Cal. Dec. 15, 2005)—have

[14]*See* Dr. Heath's declaration in response to the February 13 request for supplemental briefing, at p. 9.

required second doses of potassium chloride to stop promptly the beating of their hearts.[15] The Court need not list all such anomalies here. It is sufficient for purposes of resolving the present motion to note that Plaintiff has raised more substantial questions than his counterparts in *Cooper* and *Beardslee*.

V

The fact that Plaintiff has raised such questions does not mean that he must be granted a stay of execution. The State's "strong interest in proceeding with its judgment," *Gomez v. U.S. Dist. Ct. N.D. Cal.*, 503 U.S. 653, 654 (1992), is no less important here than it was in *Cooper* and *Beardslee*. It has been nearly twenty-five years since Plaintiff committed the crimes for which he now faces the death penalty. Even if the Court were to hold an evidentiary hearing and Plaintiff were to prevail, Plaintiff would remain under a sentence of death. Neither the death penalty nor lethal injection as a means of execution would be abolished. At best, Plaintiff would be entitled to injunctive relief requiring the State to modify its lethal-injection protocol to correct the flaws Plaintiff has alleged. Presumably, at some point, Plaintiff would be executed.

Having given the matter much thought, the Court concludes that it is within its equitable powers to fashion a remedy—set forth below as the order of the Court—that preserves both the State's interest in proceeding with Plaintiff's execution and Plaintiff's constitutional right not to be subject to an undue risk of extreme pain. Should Defendants decline to implement this remedy, the Court will stay the execution and hold an evidentiary hearing within ninety days in order to resolve the questions raised by the execution logs.

Whether or not Defendants implement the remedy and thus proceed to execute Plaintiff as scheduled, the Court respectfully suggests that Defendants conduct a thorough review of the lethal-injection protocol, including, *inter alia*, the manner in which the drugs are injected, the means used to determine when the person being executed has lost consciousness, and the quality

---

[15]At a press conference immediately following Allen's execution, Warden Ornoski stated that a second dose of potassium chloride was required because "this guy's heart has been beating for 76 years, and it took awhile for it to stop." Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution*, S.F. Chron., Jan. 17, 2006, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/17/MNG37GOHD715.DTL.

of contemporaneous records of executions, such as execution logs and electrocardiograms. Given the number of condemned inmates on California's Death Row, the issues presented by this case are likely to recur with considerable frequency. Because California's next execution is unlikely to occur until the latter part of this year, the State presently is in a particularly good position to address these issues and put them to rest. It is hoped that the remedy ordered by this Federal Court in this case will be a one-time event; under the doctrines of comity and separation of powers, the particulars of California's lethal-injection protocol are and should remain the province of the State's executive branch. A proactive approach by Defendants would go a long way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol.

VI

As noted at the outset, the present action concerns the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed. While the Court finds that Plaintiff has raised substantial questions in this regard, it also concludes that those questions may be addressed effectively by means other than a stay of execution, and that these alternative means would place a substantially lesser burden on the State's strong interest in proceeding with its judgment.

Accordingly, and good cause therefor appearing, Plaintiff's motion for a preliminary injunction is conditionally DENIED. Defendants may proceed with the execution scheduled for February 21, 2006, provided that they do one of the following:

1) Certify in writing, by the close of business on Thursday, February 16, 2006, that they will use only sodium thiopental or another barbiturate or combination of barbiturates in Plaintiff's execution.[16]

---

[16]In their response to the February 13 request for supplemental briefing, Defendants assert that while sodium thiopental alone would be effective to cause Plaintiff's death, its use without the other two drugs would cause the execution to be unduly prolonged. Plaintiff correctly points out that there is no evidence in the record to support Defendants' claim that the execution could last as long as forty-five minutes. The execution logs show that several executions pursuant to the current protocol took

2) Agree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected. Because Plaintiff has raised a substantial question as to whether a person rendered unconscious by sodium thiopental might regain consciousness during the administration of pancuronium bromide or potassium chloride,[17] the presence of such person(s) shall be continuous until Plaintiff is pronounced dead. With respect to this alternative:

(a) A "qualified individual" shall be a person with formal training and experience in the field of general anesthesia. The nature and extent of such training and experience shall be set forth in a declaration submitted to the Court on or before the close of business on Wednesday, February 15, 2006. Plaintiff may file any comments he may have with respect to the qualifications of such person(s) not later than 12:00 noon on Thursday, February 16, 2006. The Court will advise the parties as to whether it finds the person(s) to be qualified by the close of business on Thursday, February 16, 2006.

(b) The person(s) may be employees of the Department of Corrections and Rehabilitation.[18]

(c) If Defendants wish to keep the identity of such person(s) confidential, they

---

considerably longer than anticipated. While the Court has no wish to burden the participants in and witnesses to Plaintiff's execution with additional stress in what obviously is a very difficult situation, it concludes that the questions surrounding the protocol justify an exception to the standard procedure in this one instance, particularly in lieu of a stay of execution. The Court's purpose in permitting Defendants to use other barbiturates or a combination of barbiturates is to give Defendants flexibility with respect to the length of the execution; such an approach appears to be fully consistent both with the law—"the precise execution protocol is subject to alteration until the time of execution," *Beardslee*, 395 F.3d at 1069—and with the opinions of Plaintiff's medical expert, Dr. Heath.

[17]*See, inter alia*, the excerpts from the execution logs summarized above and Dr. Heath's declaration filed in response to the February 13 request for supplemental briefing, at p. 9.

[18]Defendants have indicated through declarations and in their offer of proof regarding lethal-injection procedures that medical doctors, registered nurses, and licensed vocational nurses employed by the Department have rôles at executions. At this time, the Court has no information as to the specific training and experience of these individuals.

may submit their declaration setting forth the qualifications of such person(s) with personal identifiers redacted, except that the redacted information shall be provided to the Court for *in camera* review by e-mail to g_o_kolombatovich@cand.uscourts.gov.

(d) During the execution, the person(s) may wear appropriate clothing to protect their anonymity.

If Defendants reject both of the alternatives described above, a stay of execution will issue without the necessity of further proceedings. In that event, the Court will hold an evidentiary hearing on the merits of Plaintiff's claims on Tuesday, May 2, 2006, and Wednesday, May 3, 2006. The Court will issue a briefing schedule and orders with respect to discovery should that become necessary.

The Court will retain jurisdiction with respect to Defendants' implementation of the remedy provided for herein. This order otherwise is intended to be final for purposes of appellate review.

IT IS SO ORDERED.

DATED: February 14, 2006

JEREMY FOGEL
United States District Judge

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: dane.gillette@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, **v.** **RODERICK HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants.	**CAPITAL CASE** C 06-219 JF

DEFENDANTS' RESPONSE TO COURT'S CONDITIONAL DENIAL OF PRELIMINARY INJUNCTION

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: dane.gillette@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, v. **RODERICK HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants.	**CAPITAL CASE** C 06-219 JF **DEFENDANTS' RESPONSE TO COURT'S CONDITIONAL DENIAL OF PRELIMINARY INJUNCTION**

In an order filed February 14, 2006, the Court denied plaintiff's motion for a preliminary injunction to prevent his scheduled execution conditioned upon defendants' agreement to one of two alternatives. The first requires that only sodium thiopental be used in the execution. The second alternative requires the continuous presence of a qualified individual to verify through direct observation and examination that plaintiff is unconscious before the pancuronium bromide or potassium chloride is injected. Defendants will comply with the second alternative. To that end they have obtained the services of two highly qualified, board certified anesthesiologists to monitor plaintiff throughout the execution. One of the experts will be designated the primary, with the other

available as backup if needed. The names of the experts and the information necessary to establish the requisite training and experience in anesthesiology is set forth in the declaration of Dane R. Gillette, lodged under seal as authorized by the Court's order. The declaration of Dane R. Gillette attached to this pleading contains redacted information about the experts.

Dated: February 15, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Defendants

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: dane.gillette@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, **v.** **RODERICK HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants.	**CAPITAL CASE** C 06-219 JF **DECLARATION OF DANE R. GILLETTE IN SUPPORT OF DEFENDANTS' RESPONSE TO COURT'S CONDITIONAL DENIAL OF PRELIMINARY INJUNCTION**

I, DANE R. GILLETTE, declare as follows:

1. I am a Senior Assistant Attorney General assigned to represent defendants in this proceeding.

2. Plaintiff Michael Morales is scheduled to be executed at San Quentin State Prison on February 21, 2006.

3. In an order filed February 14, the Court denied plaintiff's motion for preliminary injunction challenging the state's procedure for conducting executions by means of lethal injection. The order was conditioned on defendants agreeing to only use sodium thiopental to execute plaintiff,

or to provide a qualified individual who will continually monitor plaintiff during the execution to verify by direct observation and examination that he is unconscious after injection of thiopental and before the pancuronium bromide and potassium chloride are injected. The Court defined a qualified individual as a person with formal training and experience in the field of general anesthesia. It further provided that the identity of the person may remain confidential.

4. Defendants will comply with the Court's second alternative and have obtained the services of two qualified anesthesiologists. Because both have asked that their identities not be disclosed the necessary information is being provided in a sealed declaration lodged only with the Court.

5. The primary qualified individual, a physician licensed to practice in California and a Board certified anesthesiologist, will be present during the execution to monitor plaintiff and provide the verification required by the Court's order. His expertise and credentials are set forth in his redacted curriculum vitae, attached as Exhibit A.

6. Should the primary individual be unavailable for any reason, a backup qualified individual, a physician licensed to practice in California and Board certified anesthesiologist, will be present during the execution to monitor plaintiff and provide the verification required by the Court's order. His expertise and credentials are set forth in his redacted curriculum vitae, attached as Exhibit B.

7. Both doctors will meet with the warden and other members of the execution team prior to the date of the execution to establish procedures for conveying the necessary verification.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at San Francisco, California on February 15, 2006..

DANE R. GILLETTE
Senior Assistant Attorney General

Attorney for Defendants

EXHIBIT A

Curriculum Vitae

[redacted], M.D.

Current Activity:
Chief of Anesthesia, [redacted] CA (200[redacted] to present)

Clinical Experience:
Staff Anesthesiologist, [redacted] Hospital (200[redacted] to present)
Staff Anesthesiologist, [redacted] Hospital, [redacted] CA (198[redacted] to 200[redacted])
Assistant Clinical Professor, Volunteer Faculty, [redacted] (198[redacted] to 198[redacted])
Assistant Clinical Professor, Department of Anesthesiology, [redacted] (198[redacted] to 198[redacted])

Professional History:
[redacted]
California Society of Anesthesiologists (199[redacted] to 199[redacted])
Vice-Chairman, Department of Anesthesiology, [redacted] Hospital (199[redacted] to 199[redacted])
(199[redacted] to 199[redacted])
[redacted] (199[redacted] to 199[redacted])
Delegate, American Society of Anesthesiologists (199[redacted] to 199[redacted])
Medical Staff Delegate, Medical Executive Committee, [redacted] (199[redacted] to 199[redacted])
Instructor, Advanced Cardiac Life Support, American Heart Association (199[redacted] to 199[redacted])
Member, Medical Executive Committee, [redacted] Hospital (198[redacted] to 198[redacted])
Chairman, Department of Anesthesiology, [redacted] Hospital (198[redacted] to 198[redacted])
Chairman, Department of Anesthesiology, [redacted] (198[redacted] to 198[redacted])
Assistant Clinical Professor, Volunteer Faculty, [redacted] (198[redacted] to 198[redacted])
Assistant Clinical Professor, Department of Anesthesiology, [redacted] (198[redacted] to 198[redacted])

Professional Societies:
International Anesthesia Research Society
American Society of Anesthesiologists
California Society of Anesthesiologists

Licensure:
California [redacted] expires [redacted]/2007

Board Certification:
Diplomate, American Board of Anesthesiology (198[redacted])

Education:
MD, [redacted] School of Medicine, [redacted] (197[redacted]-197[redacted])
Internship, Straight Surgery, University [redacted] (197[redacted]-197[redacted])
Residency, Anesthesiology, University [redacted] (197[redacted]-197[redacted])
Fellowship, Anesthesiology, [redacted] Clinic, [redacted] (197[redacted]-198[redacted])

EXHIBIT B

CURRICULUM VITAE

[redacted]

Phone: [redacted]
Beeper: [redacted]
FAX: [redacted]

PERSONAL
Place of Birth: [redacted]
Spouse [redacted]

PROFESSIONAL EXPERIENCE
198[redacted]-Present Staff Anesthesiologist [redacted]

200[redacted]-Present Chair of Department
198[redacted]-199[redacted]

199[redacted]-199[redacted] ICU Committee
199[redacted]-199[redacted] Chair of ICU Committee

199[redacted]-Present Director, Chairman and President [redacted] Inc.

EDUCATION
198[redacted]-198[redacted] Anesthesiology Residency [redacted] CA

198[redacted]-198[redacted] Flexible Internship [redacted], CA

197[redacted]-198[redacted] [redacted] University School of Medicine, [redacted]

197[redacted]-197[redacted] University of [redacted]

LICENSURE AND CERTIFICATION
Diplomate, American Board of Anesthesiology Certificate #[redacted]
(Passed Oral Boards [redacted]
California Physicians & Surgeons Certificate [redacted] (Issued [redacted])
[redacted] Physician Medical License # [redacted] (Issued [redacted])
[redacted] Physician and Surgeons License [redacted]
Neonatal Advanced Life Support Certification (NALS) (Issued [redacted])

David A. Senior (# 108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R. Grele (# 167080)
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Attorneys For Plaintiff MICHAEL ANGELO MORALES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, v. RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Defendants.	Case No. C 06 0219 (JF) C 06 926 (JF) **PLAINTIFF'S RESPONSE TO MODIFICATION OF LETHAL INJECTION PROCEDURE**

Defendants have responded to the Court's conditional denial of an injunction by submitting the heavily redacted credentials of two California medical doctors who will "monitor" the execution. Plaintiff has several problems with this response and with the new procedure proposed by this Court.

This Court offered Defendants two last-minute alterative conditions as a means to allow the execution process to continue forward on the rigorous schedule set by the State. Although the issue of unconsciousness has been a critical inquiry since at least the *Cooper* case, and medical aspects of that inquiry have been explored since at least *Beardslee*, the State has done nothing to address these concerns until now, five days before Plaintiff's schedule execution, and then only as a means to appease the Court to allow the execution to take place as scheduled. Mr. Morales has been before this Court for more than a month, but consideration and resolution has been delayed as each time the state failed to adequately address another argument, further briefing was ordered. Now, with less than five days to go, Defendants accept the Court's offer and plan to have two doctors monitor unconsciousness, a time table that ensures only that the proposed procedures and Mr. Morales' claim will not receive timely and meaningful review. Had Plaintiff arrived in this Court with less than five days to live, the Court would have no doubt dismissed him for being untimely. The State should not be permitted to proceed with a new protocol that has even less time to be scrutinized.

As for the new procedure, the Court's order leaves many questions unanswered. Design and implementation of a lethal injection protocol falls within the State's domain, subject to compliance with constitutional imperatives. The CDCR is supposed to adopt such procedures following considered review and debate, and consultation with not only

its security staff, but medical personnel and other experts in the field. Only after such careful consideration can the CDCR then issue a procedure describing the various roles of the individuals involved, the equipment that is going to be used, and the timing of events. Such a reasoned process has not been followed here, nor could it, given the time allowed.[1] Likewise, the time constraints prevent Defendants from consulting with other states about the new procedure, a vetting process Defendants have contended was followed in devising Procedure No. 770.

The main lack of clarity in Defendants' response concerns the monitoring and what it will entail. Neither Plaintiff nor, apparently, Defendants know what these doctors will be doing in their roles as monitors other than to "report back to the court" the results. *See www.latimes.com/news/local/la-me-morales16feb16,0,1949969.story?coll=la-headlines-california* ("I can't tell you what they will do; that is something the anesthesiologists will have to work out with the prison," said J.C. Tremblay, assistant secretary for the Department of Corrections. "Basically, the doctors will be brought in as experts to observe and then report back to the court."). As it currently appears, the only thing the monitors will be able to do is sit in the antechamber and attempt to view the process, as Procedure No. 770's prohibition against any person remaining in the chamber is still in effect. Defendants' response has not described a single action by these doctors that comports with "a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered." The doctors will

[1] Indeed, this new procedure is a gross violation of the state's Administrative Procedure Act (Cal. Gov. Code § 11349 et seq.), as well as the agency's own regulations (15 Cal. Code Regs. s. 3380(c)& (d) [limiting written approval to Wardens, subject to approval by the Director]; Procedure 770 section IV [requiring Warden and director approval].). Both are designed to avoid just such difficulties as are presented by last-minute alterations in processes such as we have here. Time has prevented a review of the Department Operations Manual and other Government Code sections that this may violate.

have no authority to stop the execution and are not even part of the process in determining what chemicals are administered and when. This does nothing to alleviate the "substantial questions" that have arisen from 4 of the past 6 and 6 of the past 13 executions. Defendants have not even attempted to describe what type of "observations" or "examinations" are going to be conducted. This lack of clarity plainly prevents any considered review and reduces Mr. Morales to little more than a test subject.

The American Society of Anesthesiologists requires very explicit guidelines for such events with procedures and equipment defined. They have been previously submitted to the Court. No such specificity is contained in Defendants' last-minute, cobbled-together effort to execute. Defendants do not even attempt to assert that accepted procedures will be employed and do not describe any of the required equipment as even being made available. Time does not permit researching of these, and a discussion of what will be employed and how.

Plaintiff's concerns are heightened by the fact that Defendants have cloaked the proposed process with a degree of secrecy that is not permitted by the Court's order, and that again is designed solely to prevent considered review. They have submitted declarations by the doctors under seal with "the necessary information," even though, the Court only permitted redactions of identifying information. Plaintiff needs immediate disclosure of whatever the "necessary information" is if he is to have any chance to review and analyze whatever is contained therein, or to offer counter information to the Court, or even to contest it. Under the current time-line, Plaintiff simply cannot obtain the meaningful review to which he is entitled.

Finally, the doctors' identities should be revealed to Plaintiff's counsel under a suitable protective order. Otherwise, review of whether these doctors have the requisite experience in administering the paralytic agent (most no longer use it) and in what procedures is impossible. Obviously, the chemicals used in the protocol are administered in a massive dose that will cause death, and the doctors must have some experience in this area beyond a few administrations in the distant past. In fact, without identifying information, Plaintiff cannot check on the bona fides of the doctors, or bring to the Court's attention histories that may reflect on their abilities or credibility in whatever "verification" they are going to employ.

For the foregoing reasons, the State's response should be rejected, and the preliminary injunction and stay of execution granted.

MICHAEL ANGELO MORALES

Dated: February 16, 2006

By: /s/
John R Grele

David A. Senior (# 108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R. Grele (# 167080)
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken
Janice H. Lam
Stephanie L. Reinhart
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Ginger D. Anders
Jenner & Block LLP
601 Thirteenth Street, NW
Suite 1200 South
Washington DC 20005-3823
Phone: (202) 639-6000
Fax: (202) 639-6066
ganders@jenner.com

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: gillette.dane@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, v. **RODERICK HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants.	**CAPITAL CASE** C 06-219 JF

DEFENDANTS' SUPPLEMENTAL RESPONSE TO COURT'S CONDITIONAL DENIAL OF PRELIMINARY INJUNCTION

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: gillette.dane@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES,

Plaintiff,

v.

RODERICK HICKMAN, Secretary; STEVEN ORNOSKI, Warden,

Defendants.

CAPITAL CASE

C 06-219 JF

DEFENDANTS' SUPPLEMENTAL RESPONSE TO COURT'S CONDITIONAL DENIAL OF PRELIMINARY INJUNCTION

The attached declaration of Bruce M. Slavin further documents the background and qualifications of the anesthesiologist identified in yesterday's pleading, as well as the procedures to be followed by them during the execution. Declarations of both doctors confirming the information in their resumes will be lodged with the Court under seal as soon as they can be obtained.

Dated: February 16, 2006

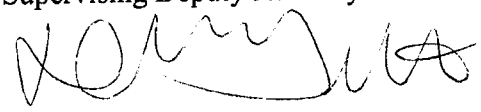
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General



DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Defendants

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD AS. ENGLER
Senior Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
445 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Email: dane.gillette@doj.ca.gov

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, v. **RODERICK HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants.	**CAPITAL CASE** C 06-219 JF C 06-926 JF RS **DECLARATION OF BRUCE M. SLAVIN**

I, BRUCE M. SLAVIN, declare:

1. I am attorney admitted to the practice of law before the courts of the State of California and before this court. I am employed as the General Counsel of the California Department of Corrections and Rehabilitation.

2. I have personally spoken to the anesthesiologists whose Curriculum Vitae (CV) were submitted to this court yesterday as Exhibits A and B to the Declaration of Dane R. Gillette in support of Defendants' Response to Court's Conditional Denial of Preliminary Injunction. I confirmed that the information set forth in both CVs is correct. I also confirmed that neither doctor has ever participated in or observed an execution. I further confirmed that neither doctor has

ever been convicted of a felony, been disciplined by the medical board of any state, or suffered an adverse judgment related to his practice of medicine. I also confirmed that both doctors are licensed to practice medicine in the State of California and currently practice in this state. This information was obtained through conversation with each doctor. My office is in the process of obtaining verification of this information through independent sources.

3. I have spoken with both doctors and the warden of San Quentin about the participation of these doctors in the scheduled execution of Michael Morales. I confirmed that one doctor will be physically present in the execution chamber to monitor the consciousness of Mr. Morales using whatever equipment or other techniques he deems medically appropriate. The other doctor will be present outside the chamber as an observer. Other than the monitoring of Mr. Morales by the doctor who will be present in the execution chamber, the process by which San Quentin carries out an execution has not been changed from that set forth in Operations Procedure No. 770.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Sacramento, California, February 16, 2006.

Bruce M. Slavin

BRUCE M. SLAVIN

E-filed 2/16/06

DESIGNATED FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES, Plaintiff, v. Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoski, Acting Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 06 219 JF Case Number C 06 926 JF RS DEATH-PENALTY CASE FINAL ORDER RE DEFENDANTS' COMPLIANCE WITH CONDITIONS; ORDER DENYING PLAINTIFF'S MOTIONS FOR DISCOVERY OF INFORMATION AND FOR RECONSIDERATION [Docket No. 64]

Pursuant to this Court's order of February 14, 2006, denying conditionally Plaintiff's motion for a preliminary injunction, Defendants have submitted to the Court under seal the names and curricula vitae of two board-certified anesthesiologists who will, as directed in the order,

> independent[ly] verif[y], through direct observation and examination . . . in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected. Because Plaintiff has raised a substantial question as to whether a person rendered unconscious by sodium thiopental might regain consciousness during the administration of pancuronium

> bromide or potassium chloride, the presence of [the anesthesiologists] shall be continuous until Plaintiff is pronounced dead.

Defendants also have publicly filed copies of the curricula vitae "with personal identifiers redacted" so that the anesthesiologists may preserve their anonymity. *Morales v. Hickman*, ___ F. Supp. 2d ___, Nos. C 06 219 JF & C 06 926 JF RS, 2006 WL 335427, at *8 (N.D. Cal. Feb. 14, 2006) (footnote omitted).

Plaintiff has filed a request for the release of this information (subject to a protective order) so that he may investigate whether the anesthesiologists have the credentials claimed, whether they have any disciplinary or litigation history that would cause concern about their experience or expertise, and whether they have participated in previous executions—including, in particular, the execution of Stanley Tookie Williams, because "[i]t appears that the formal log [of the Williams execution] has been altered without any indication as to who made the alteration." *Id.* at *6 n.13. Plaintiff also requests additional information with respect to the anesthesiologists, including information about lawsuits, criminal history, and references. Alternatively, Plaintiff requests that the Court obtain and review these materials *in camera*.

To the extent that Plaintiff asks that the information in question be released to his counsel, the request will be denied. The Court's order of February 14, 2006, contains specific provisions for assuring that the persons monitoring the execution retain their anonymity, and it may be presumed that the individuals whom Defendants have designated for that purpose have undertaken their responsibilities with that understanding. However, Plaintiff's suggestion that the Court should review additional information *in camera* in order to make a proper determination of the individuals' qualifications is well-taken. Accordingly, in response to Plaintiff's suggestion, the Court this morning telephonically directed Defendants to submit declarations under penalty of perjury that respond to these concerns. Defendants also have filed publicly a declaration from Bruce M. Slavin, the General Counsel of the Department of Corrections and Rehabilitation, and Defendants have agreed to submit under seal personal declarations from the two anesthesiologists: Slavin's declaration contains, and Defendants'

counsel represents that the anesthesiologists' declarations will contain, statements under penalty of perjury that the anesthesiologists have the credentials set forth in their respective curricula vitae; that they do not have any criminal, disciplinary, or litigation history that would bear upon their experience or expertise; and that they have not participated in any previous executions. Subject to the actual submission and review by the Court of the anesthesiologists' declarations (which will occur after the Court issues the present order) and considering Defendants' counsel's representations as to what the declarations will show[1] together with Slavin's declaration[2] and the declaration of Defendants' counsel and the curricula vitae received by the Court on February 15, 2006, the Court finds and concludes that the two anesthesiologists are "qualified individuals" as defined in the Court's order of February 14, 2006. *See id.* at *8.

Plaintiff also has filed comments as directed by the Court's order. *See id.* Plaintiff contends that there has been insufficient time for meaningful review of the conditions under which he will be executed since the Court issued its order of February 14, 2006. In particular, Plaintiff suggests that Defendants might seek to comply with the order by having the

---

[1]The Court will notify counsel for Plaintiff as soon as it has the anesthesiologists' declarations in hand. Obviously, if the contents of the declarations differ in any respect from counsel's representations as to what the declarations will contain, the Court will take appropriate action and retains jurisdiction to do so. The present order is issued at this time solely to enable Plaintiff to pursue timely appellate review.

[2]Slavin has declared that:

> I have personally spoken to the anesthesiologists whose Curriculum [sic] Vitae (CV) were submitted to this court yesterday as Exhibits A and B to the declaration of Dane R. Gillette in support of Defendants' Response to Court's Conditional Denial of Preliminary Injunction. I confirmed that the information set forth in both CVs is correct. I also confirmed that neither doctor has ever participated in or observed an execution. I further confirmed that neither doctor has ever been convicted of a felony, been disciplined by the medical board of any state, or suffered an adverse judgment related to his practice of medicine. I also confirmed that both doctors are licensed to practice medicine in the State of California and currently practice in this state. This information was obtained through conversations with each doctor. My office is in the process of obtaining verification of this information through independent sources.

Slavin Decl. ¶ 2.

anesthesiologists do nothing more than sit in the antechamber and attempt to view the execution process. Finally, Plaintiff expresses concern that applicable guidelines of the American Society of Anesthesiologists may not be observed.

In fact, however, the relevant terms of the Court's order of February 14, 2006, order are quite specific. As set forth above, the order directs the anesthesiologists to "independent[ly] verif[y], through direct observation and examination . . . in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected." *Id.* This language necessarily requires both that at least one of the anesthesiologists be present in the execution chamber and that the anesthesiologists' duties be performed in accordance with current professional medical standards. In particular, the anesthesiologists may use and would be expected to use whatever monitoring equipment a board-certified anesthesiologist would deem necessary to ensure that a patient to whom a combination of a barbiturate and a paralytic have been administered is fully unconscious at all times following the administration of sodium thiopental.[3]

Significantly, the precise terms of the Court's order of February 14, 2006 were influenced to a very large extent by the opinions of Plaintiff's own medical expert, Dr. Mark Heath. In his declaration submitted two days ago, Dr. Heath stated:

---

[3]Slavin has declared further that:

> I have spoken with both doctors and the warden of San Quentin about the participation of these doctors in the scheduled execution of Michael Morales. I confirmed that one doctor will be physically present in the execution chamber to monitor the consciousness of Mr. Morales using whatever equipment or other techniques he deems medically appropriate. The other doctor will be present outside the chamber as an observer. Other than the monitoring of Mr. Morales by the doctor who will be present in the execution chamber, the process by which San Quentin carries out an execution has not been changed from that set forth in Operations Procedure No. 770.

Slavin Decl. ¶ 3. To the extent that Slavin's declaration might be read to imply otherwise, the Court construes Slavin's use of the word "monitor" to mean that the anesthesiologists will take all medically appropriate steps to ensure that Plaintiff is and remains unconscious after Plaintiff is injected with sodium thiopental and before he is injected with pancuronium bromide or potassium chloride.

> Regarding the possibility of "the presence of a qualified individual approved by the Court to insure that the Plaintiff is in fact unconscious," it is my strongly-held opinion that this would . . . represent a very positive step toward resolving concerns about the humaneness of the lethal injection procedure. While no complex human endeavor can ever be completely error-free, it is not disputable that the probability of error is reduced when complex tasks are performed by trained and experienced personnel. [¶] . . . Thus, a "qualified individual" would be someone with significant training and experience in the provision of general anesthesia, such as an anesthesiologist or Certified Registered Nurse Anesthetist (CRNA). The presence of a qualified individual at the "bedside" of the condemned prisoner, with the ability and intent to physically examine the prisoner and to view vital sign monitors, would meet the standard of care for general anesthesia, would meet the standard of care for veterinary euthanasia by potassium chloride administration, and could, if properly done, reasonably "insure that Plaintiff is in fact unconscious." ¶ . . . In summary, it is my strongly-held opinion that the inclusion of an individual with demonstrated experience and training in the provision of general anesthesia and the assessment of anesthetic depth is an easily-taken step that would greatly reduce the possibility of an inhumane execution.

4th Heath Decl. ¶¶ 10, 11, & 13. The Court intentionally fashioned its order so that the anesthesiologists would perform their duties precisely as contemplated by Dr. Heath. *Cf.* 2006 WL 335427, at *8 n.16.

While the Court believes that its prior order was sufficiently clear, Plaintiff points out that Defendants nonetheless may have misinterpreted it, as at least one Department of Corrections and Rehabilitation official has been quoted as suggesting to the news media that the anesthesiologists merely "'will be brought in as experts to observe and then report back to the court.'" Louis Sahagun, "Anesthesiologist to Monitor Execution," L.A. Times, Feb. 16, 2006, *available at* http://www.latimes.com/news/local/la-me-morales16feb16,0,1949969.story?coll=la-headlines-california. However, Defendants themselves as well as the anesthesiologists are presumed to understand and comply with the order in the context of the medical evidence provided by Dr. Heath and Defendants' medical expert, Dr. Mark Dershwitz. It has been demonstrated to the Court's satisfaction that the anesthesiologists designated by Defendants are qualified professionals who will use their professional judgment not merely to observe the execution but to *ensure* that Plaintiff is and remains unconscious before he is injected with

pancuronium bromide and potassium chloride. The anesthesiologists necessarily are expected and required to abide by all appropriate medical standards for examination and documentation. Nothing in the Slavin declaration suggests that the Department of Corrections and Rehabilitation has a different view.

The Court concludes that, in accordance with its order of February 14, 2006, Defendants have taken appropriate steps to ensure that Plaintiff will not be subjected to a risk of unnecessary pain when he is executed. Accordingly, to the extent that Plaintiff's latest submission may be construed as a motion for reconsideration of the Court's prior order, such motion is denied. Defendants may proceed with Plaintiff's execution as scheduled subject to the conditions set forth in the Court's order of February 14, 2006, and reaffirmed in the present order.

IT IS SO ORDERED.

DATED: February 16, 2006

JEREMY FOGEL
United States District Judge

E.R. 0341

PRELIMINARY INJUNCTION APPEAL

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit From a Denial of a Preliminary Injunction

United States District Court for the Northern District of California
D.C. Nos. C 06 0219 (JF), C 06 0926 (JF)

MICHAEL ANGELO MORALES, Plaintiff, v. RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Defendants.	**NOTICE OF APPEAL** **DEATH PENALTY CASE** **EXECUTION IMMINENT: EXPEDITED REVIEW REQUESTED**

Notice is hereby given that Michael Angelo Morales, Plaintiff in the above named cases, hereby appeals to the United States Court of Appeals for the Ninth Circuit from an Order Denying Conditionally Plaintiff's Motion for a Preliminary Injunction entered in these actions on the 14th day of February, 2006, and the Final Order re Defendants' Compliance with Conditions; Order Denying Plaintiff's Discovery of Information and for Reconsideration entered in these actions dated February 16, 2006.

Dated: February 17, 2006

By: _____
John R. Grele
Attorney for Michael Angelo Morales
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364

CAPITAL, CONSOL, E-Filing, ProSe

U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:06-cv-00219-JF

Morales v. Hickman et al
Assigned to: Hon. Jeremy Fogel
Related Case: 5:06-cv-00926-JF
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 01/13/2006
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Michael A. Morales

represented by **David A. Senior**
McBreen & Senior
1880 Century Park East
Suite 1450
Los Angeles, CA 90067
310-552-5300
Fax: 310-552-1205
Email: dsenior@mcbreensenior.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John R. Grele
Law Office of John R Grele
703 Market Street
Suite 550
San Francisco, Ca 94103
415-348-9300
Fax: 415-348-0364
Email: jgrele@earthlink.net
ATTORNEY TO BE NOTICED

Richard P. Steinken
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
312-923-2938
Fax: 312-840-7338
Email: rsteinken@jenner.com
ATTORNEY TO BE NOTICED

V.

E.R. 0343

Defendant

Roderick Q. Hickman
Secretary of the California Department

represented by **Dane R. Gillette**
State Attorney General's Office

of Corrections

455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
415/703-5866
Fax: 415/703-5877
Email: dane.gillette@doj.ca.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Steven Ornoski
Warden, San Quentin State Prison

represented by **Dane R. Gillette**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Miscellaneous

Habeas Corpus Resource Center

represented by **Habeas Corpus Resource Center**
50 Fremont Street
Suite 1800
San Francisco, CA 94105
415-348-3800
Email: mlaurence@hcrc.ca.gov
PRO SE

Miscellaneous

California Appellate Project

represented by **California Appellate Project**
One Ecker Place, Suite 400
San Francisco, CA 94105
US
PRO SE

Date Filed	#	Docket Text
01/13/2006	1	COMPLAINT for Equitable and Injunctive Relief against Roderick Q. Hickman, Steven Ornoski (Filing fee $ 250, receipt number 3380416.) Filed byMichael A. Morales. (rcs, COURT STAFF) (Filed on 1/13/2006) Additional attachment(s) added on 1/24/2006 (gm, COURT STAFF). Additional attachment(s) added on 1/27/2006 (gm, COURT STAFF). (Entered: 01/18/2006)
01/13/2006		Summons Issued as to Roderick Q. Hickman, Steven Ornoski. (rcs, COURT STAFF) (Filed on 1/13/2006) (Entered: 01/18/2006)
01/13/2006		CASE DESIGNATED for Electronic Filing. (rcs, COURT STAFF) (Filed on 1/13/2006) (Entered: 01/18/2006)
01/18/2006	2	ORDER RELATING CASE signed by Judge Maxine M. Chesney on January 18, 2006. (mmcsec, COURT STAFF) (Filed on 1/18/2006) (Entered: 01/18/2006)

E.R. 0344

01/19/2006	3	SCHEDULING ORDER. Signed by Judge Jeremy Fogel on 1/19/06. (jfsec, COURT STAFF) (Filed on 1/19/2006) (Entered: 01/19/2006)
01/19/2006	4	ORDER REASSIGNING CASE. Case reassigned to Judge Jeremy Fogel for all further proceedings. Judge Maxine M. Chesney no longer assigned to case.Signed by Executive Committee on 1/19/06. (as, COURT STAFF) (Filed on 1/19/2006) (Entered: 01/19/2006)
01/20/2006	5	**FILED IN ERROR. PLEASE SEE DOCKET #1** **COMPLAINT against all defendants (Filing fee $ 250.). Filed byMichael A. Morales. (Attachments: # 1 Exhibit A)(Grele, John) (Filed on 1/20/2006) Modified on 1/24/2006 (gm, COURT STAFF). (Entered: 01/20/2006)**
01/20/2006	6	MOTION for Discovery filed by Michael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	7	Declaration *of John R Grele* filed byMichael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	8	Proposed Order *Granting Discovery* by Michael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	9	MOTION to Shorten Time *to Hear Discovery Motion* filed by Michael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	10	Declaration *in support of Motion to Shorten Time* filed byMichael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	11	Proposed Order *to Shorten Time* by Michael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	12	MOTION for Temporary Restraining Order filed by Michael A. Morales. Motion Hearing set for 1/26/2006 02:00 PM in Courtroom 3, 5th Floor, San Jose. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	13	EXHIBITS re 12 MOTION for Temporary Restraining Order *Exhibit A* filed byMichael A. Morales. (Related document(s)12) (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	14	EXHIBITS re 12 MOTION for Temporary Restraining Order *Exhibit B* filed byMichael A. Morales. (Related document(s)12) (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	15	EXHIBITS re 12 MOTION for Temporary Restraining Order *Exhibit C (Heath Decl.)* filed byMichael A. Morales. (Attachments: # 1 Exhibit Curriculum Vitae# 2 Exhibit Execution Logs# 3 Exhibit Rocconi Declaration# 4 Exhibit Derswitz Decl in Cooper# 5 Exhibit AVMA report# 6 Exhibit ASA Advisory# 7 Exhibit Dershwitz Aff in Perkins# 8 Exhibit Williams Execution Article)(Related document(s)12) (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/20/2006	16	Proposed Order re 12 MOTION for Temporary Restraining Order by

		Michael A. Morales. (Grele, John) (Filed on 1/20/2006) (Entered: 01/20/2006)
01/23/2006	17	Memorandum in Opposition *TO APPLICATION TO TRO* filed bySteven Ornoski. (Gillette, Dane) (Filed on 1/23/2006) (Entered: 01/23/2006)
01/23/2006	18	EXHIBITS *PART 1* filed bySteven Ornoski. (Gillette, Dane) (Filed on 1/23/2006) (Entered: 01/23/2006)
01/23/2006	19	EXHIBITS *PART 2* filed bySteven Ornoski. (Gillette, Dane) (Filed on 1/23/2006) (Entered: 01/23/2006)
01/23/2006	20	NOTICE by Steven Ornoski *LODGING DOCUMENT UNDER SEAL* (Gillette, Dane) (Filed on 1/23/2006) (Entered: 01/23/2006)
01/25/2006	21	Reply Memorandum *in Support of Motions for TRO and Discovery* filed byMichael A. Morales. (Grele, John) (Filed on 1/25/2006) (Entered: 01/25/2006)
01/25/2006	22	EXHIBITS re 21 Reply Memorandum filed byMichael A. Morales. (Attachments: # 1 Exhibit 1 to Heath Declaration# 2 Exhibit 2 to Heath Declaration# 3 Exhibit 3 to Heath Declaration)(Related document(s)21) (Grele, John) (Filed on 1/25/2006) (Entered: 01/25/2006)
01/25/2006	23	***** FILED IN ERROR. DOCUMENT LOCKED. PLEASE SEE DOCKET #24. ***** EXHIBITS re 21 Reply Memorandum *Exhibit A (Senior Declaration)* filed byMichael A. Morales. (Related document(s)21) (Grele, John) (Filed on 1/25/2006) Modified on 1/25/2006 (ewn, COURT STAFF). Modified on 1/26/2006 (ewn, COURT STAFF). (Entered: 01/25/2006)
01/25/2006	24	EXHIBITS re 21 Reply Memorandum *Exhbiit A (Senior Decalration) CORRECTION OF DOCKET # 23* filed byMichael A. Morales. (Related document(s)21) (Grele, John) (Filed on 1/25/2006) (Entered: 01/25/2006)
01/26/2006	25	EXHIBITS re 6 MOTION for Discovery *Exhibit A* filed byMichael A. Morales. (Related document(s)6) (Grele, John) (Filed on 1/26/2006) (Entered: 01/26/2006)
01/27/2006	26	Minute Entry: Motion for Temporary Restraining Order and Motion for Discovery Hearing held on 1/26/2006 before Judge Jeremy Fogel (Date Filed: 1/27/2006). Court sets the case for Preliminary Injunction hearing on 2/9/2006 at 2:00 p.m. (Court Reporter Peter Torreano.) (dlm, COURT STAFF) (Date Filed: 1/27/2006) (Entered: 01/27/2006)
01/27/2006	27	Second MOTION for Discovery filed by Michael A. Morales. (Attachments: # 1 Exhibit Exhibit 1 (discovery request)# 2 Exhibit Exhibit 2 (Discovery response)# 3 Exhibit Exhibit 3 (second request)# 4 Exhibit Exhibit 4 (second response)# 5 Exhibit Exhibit 5 (Admin Review))(Grele, John) (Filed on 1/27/2006) (Entered: 01/27/2006)
01/27/2006	28	Proposed Order re 27 Second MOTION for Discovery by Michael A. Morales. (Grele, John) (Filed on 1/27/2006) (Entered: 01/27/2006)

E.R. 0346

01/30/2006	29	Memorandum in Opposition *DEFENDANT'S RESPONSE TO PLAINTIFF DISCOVERY REQUEST* filed bySteven Ornoski. (Gillette, Dane) (Filed on 1/30/2006) (Entered: 01/30/2006)
02/01/2006	30	ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR EXPEDITED DISCOVERY by Judge Jeremy Fogel (jfsec, COURT STAFF) (Filed on 2/1/2006 AT 11:34 A.M.) Modified on 2/1/2006 (jfsec, COURT STAFF). (Entered: 02/01/2006)
02/01/2006	31	TRANSCRIPT of Proceedings held on 1/26/2006 before Judge Jeremy Fogel. Court Reporter: Peter Torreano.. (gm, COURT STAFF) (Filed on 2/1/2006) (Entered: 02/02/2006)
02/06/2006	32	Memorandum in Opposition *DEFENDANT'S SUPPLEMENTAL OPPOSITIONTO MOTION FOR INJUNCTIVE RELIEF* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	33	EXHIBITS filed byRoderick Q. Hickman. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	34	EXHIBITS *PART 1* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	35	EXHIBITS *PART 2* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	36	EXHIBITS *PART 3* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	37	EXHIBITS *PART 4* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	38	EXHIBITS *PART 5* filed byRoderick Q. Hickman. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	39	EXHIBITS *PART 6* filed byRoderick Q. Hickman. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	40	EXHIBITS *PART 7* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	41	EXHIBITS *PART 8* filed byRoderick Q. Hickman. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	42	MEMORANDUM in Support *Plaintiff's Supplemental Brief* filed byMichael A. Morales. (Grele, John) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	43	EXHIBITS *PART 9* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	44	EXHIBITS *PART 10* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	45	EXHIBITS *PART 11* filed byRoderick Q. Hickman. (Gillette, Dane)

		(Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	46	EXHIBITS *PART 12* filed byRoderick Q. Hickman. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	47	EXHIBITS *PART 13* filed byRoderick Q. Hickman. (Gillette, Dane) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	48	EXHIBITS re 42 Memorandum in Support filed byMichael A. Morales. (Attachments: # 1 Exhibit 1 -- Taylor Motion to Dismiss# 2 Exhibit 2 Taylor Declaration in Support of Stay# 3 Exhibit 3 Taylor Minute Orders# 4 Exhibit 4 Taylor Denial of Relief# 5 Exhibit 5: 8th Circuit Stay Order# 6 Exhibit 6: Declaration of Dr. Melenthil# 7 Exhibit 7: Dr. Heath Declaration# 8 Taylor 8th Cir. Brief# 9 Exhibit 9: Reid Transcript) (Related document(s)42) (Grele, John) (Filed on 2/6/2006) (Entered: 02/06/2006)
02/06/2006	50	Mail Returned as Undeliverable. Mail sent to David A. Senior. (gm, COURT STAFF) (Filed on 2/6/2006) (Entered: 02/09/2006)
02/09/2006	49	Minute Entry: Preliminary Injunction Hearing held on 2/9/2006 before Judge Jeremy Fogel (Date Filed: 2/9/2006). (Court Reporter Peter Torreano.) (pmc, COURT STAFF) (Date Filed: 2/9/2006) (Entered: 02/09/2006)
02/10/2006	51	AMENDED DOCUMENT by Michael A. Morales. Amendment to 1 Complaint, *Amended Complaint*. (Grele, John) (Filed on 2/10/2006) (Entered: 02/10/2006)
02/10/2006	52	MOTION to Consolidate Cases filed by Michael A. Morales. (Attachments: # 1 Declaration in support)(Grele, John) (Filed on 2/10/2006) (Entered: 02/10/2006)
02/10/2006	53	Proposed Order re 52 MOTION to Consolidate Cases by Michael A. Morales. (Grele, John) (Filed on 2/10/2006) (Entered: 02/10/2006)
02/13/2006	54	ORDER REQUESTING SUPPLEMENTAL BRIEFING. Signed by Judge Jeremy Fogel on 2/13/06, E-filed at 8:39 A.M. (jfsec, COURT STAFF) (Filed on 2/13/2006) (Entered: 02/13/2006)
02/13/2006	55	ORDER GRANTING REQUEST TO CONSOLIDATE by Judge Jeremy Fogel granting 52 Motion to Consolidate Cases (jfsec, COURT STAFF) (Filed on 2/13/2006) (Entered: 02/13/2006)
02/13/2006	56	Reply Memorandum *Defendants' response to court inquiry* filed bySteven Ornoski. (Gillette, Dane) (Filed on 2/13/2006) (Entered: 02/13/2006)
02/13/2006	61	TRANSCRIPT of Proceedings held on 2/9/2006 before Judge Jeremy Fogel. Court Reporter: Perer Torreano.. (gm, COURT STAFF) (Filed on 2/13/2006) (Entered: 02/14/2006)
02/14/2006	57	Reply Memorandum *to Court's Inquiry* filed byMichael A. Morales. (Attachments: # 1 Exhibit A -- news article)(Grele, John) (Filed on

E.R. 0348

		2/14/2006) (Entered: 02/14/2006)
02/14/2006	58	Declaration of Mark Heath, M.D. in Support of 57 Reply Memorandum *to Court's Inquiry* filed byMichael A. Morales. (Attachments: # 1 Exhibit 1 to Heath Declaration# 2 Exhibit 2 to Heath Declaration# 3 Exhibit 4 to Heath Declaration# 4 Exhibit 5 to Heath Declaration)(Related document(s)57) (Grele, John) (Filed on 2/14/2006) (Entered: 02/14/2006)
02/14/2006	59	EXHIBITS re 58 Declaration in Support, *Exhibit 3 to Heath Declaration* filed byMichael A. Morales. (Related document(s)58) (Grele, John) (Filed on 2/14/2006) (Entered: 02/14/2006)
02/14/2006	60	SUMMONS Returned Executed by Michael A. Morales. Michael A. Morales served on 1/19/2006, answer due 2/8/2006. (Grele, John) (Filed on 2/14/2006) (Entered: 02/14/2006)
02/14/2006	62	ORDER DENYING CONDITIONALLY PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION by Judge Jeremy Fogel (jfsec, COURT STAFF) (Filed on 2/14/2006) (Entered: 02/14/2006)
02/15/2006	63	RESPONSE in Support *redacted statement of compliance with conditional injunction* filed byRoderick Q. Hickman, Steven Ornoski. (Gillette, Dane) (Filed on 2/15/2006) (Entered: 02/15/2006)
02/15/2006	64	MOTION for Discovery *of Information* filed by Michael A. Morales. (Grele, John) (Filed on 2/15/2006) (Entered: 02/15/2006)
02/16/2006	65	Reply Memorandum *Plaintiff's Response to Modification of Procedure* filed byMichael A. Morales. (Grele, John) (Filed on 2/16/2006) (Entered: 02/16/2006)
02/16/2006	66	AFFIDAVIT *supplemental response to denial of injunction* by Roderick Q. Hickman, Steven Ornoski. (Gillette, Dane) (Filed on 2/16/2006) (Entered: 02/16/2006)
02/16/2006	67	FINAL ORDER RE DEFENDANTS' COMPLIANCE WITH CONDITIONS; ORDER DENYING PLAINTIFF'S MOTIONS FOR DISCOVERY OF INFORMATION AND FOR RECONSIDERATION. Signed by Judge Jeremy Fogel on 2/16/06. (jfsec, COURT STAFF) (Filed on 2/16/2006) (Entered: 02/16/2006)

PACER Service Center

Transaction Receipt

02/16/2006 19:17:58

PACER Login:	jb0014	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	5:06-cv-00219-JF
Billable Pages:	4	**Cost:**	0.32

E.R. 0349